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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

AMOCO PRODUCTION COMPANY and
MARATHON OIL COMPANY,
Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, TREASURER OF THE JICARILLA APACHE TRIBE, and CECIL ANDRUS, Secretary of the Interior,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Petitioners Amoco Production Company ("Amoco") and Marathon Oil Company ("Marathon") respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit entered February 22, 1980 and amended on April 25, 1980.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Jicarilla Apache Tribe has power to tax severance of oil and gas from its Executive Order Indian reservation by non-Indian lessees.

2. Whether overriding national interests expressed in the Congressional grant to the states of the power to tax oil and gas production from reservation lands are frustrated by tribal taxation of the same production.

3. Whether a power to tax founded upon the power to exclude non-members or attach conditions to their entry includes the power to impose a new tribal severance tax on mineral lessees.

4. Whether the Indian and Interstate Commerce Clause of the Constitution bars a tribal tax upon severance from reservation lands of oil and gas, most of which is delivered into interstate commerce,

a. As discriminating against interstate commerce, where the tax applies only to oil and gas "sold or transported off the Reservation," or

b. As imposing a multiple burden upon interstate commerce, where the state in which the reservation is located taxes the same activity.[1]

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[1] *List of other parties.* The only other parties not listed in the caption are a group of producers who, like Petitioners, sued to invalidate the Jicarilla severance tax. The names of those other producers who (we understand) will file a separate Petition are: J. Gregory Merrion and Robert L. Bayless, d/b/a Merrion and Bayless, Jerome T. McHugh, Chase Oil Company, Dugan Production Corporation, Consolidated Oil and Gas, Inc., Southland Royalty Company, Tesoro Petroleum Corporation, Amerada Hess, Supron Energy Corporation, Energy Reserves Group, Inc., J. M. Huber Corporation, Continental Oil Company, Atlantic Richfield Company, Phillips Petroleum Company, Tenneco Oil Company, Getty Oil Company, Gulf Oil Corporation, Mobil Oil Corporation and Oxy Petroleum, Inc.

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OPINION BELOW

The Opinion and Judgment of the Court of Appeals in consolidated appeals by the Jicarilla Apache Tribe ("the Tribe") and the Secretary of the Interior of the District Court's Judgment in favor of the Petitioners and certain others who hold oil and gas leases on the Tribe's reservation appears in Appendix A to this Petition, and is reported at 617 F.2d 537. The Order of the Court of Appeals amending its Opinion and denying a Petition for Rehearing filed by the other Appellees appears in Appendix B. No opinion was rendered by the United States District Court for the District of New Mexico. That Court's Findings of Fact and Conclusions of Law appear in Appendix C, and its Judgment appears in Appendix D.

JURISDICTION OF THIS COURT

The Opinion and Judgment of the Court of Appeals in the consolidated appeals was entered on February 22, 1980. A timely Petition for Rehearing filed by the other Appellees, but not Petitioners Amoco and Marathon, was denied, and the Opinion was amended by the insertion of a new page 6, on April 25, 1980. By Order dated May 9, 1980 (Appendix E), Justice White granted Petitioners an extension of time in which to file a Petition for a Writ of Certiorari to and including June 21, 1980.[2] By Order dated June 12, 1980 (Appendix F), Justice White granted Petitioners Amoco and Marathon a further extension of time to and including July 5, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

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[2] Petitioners filed this application for extension of time on May 9, 1980, as a protective measure, because of the lack of a reliable precedent that their time for seeking certiorari ran from the Order of the Court of Appeals on April 25, 1980, denying the Petition for Rehearing filed by the other Appellees and amending its Opinion.

CONSTITUTIONAL PROVISIONS, STATUTES, TREATY, EXECUTIVE ORDERS AND TRIBAL MATERIALS INVOLVED

The constitutional provisions involved are the Interstate and Indian Commerce Clause, art. I, § 8, cl. 3; these provisions appear in Appendix G. The statutory provisions involved are the Act of March 3, 1927, 25 U.S.C. §§ 398a-e (1976) (Appendix H); Sections 16 and 17 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. §§ 476-477 (1976) (Appendix I); and the General Leasing Act of May 11, 1938, 25 U.S.C. §§ 396a-f (1976) (Appendix J). This case also involves the Treaty of Guadalupe Hidalgo Between the United States and Mexico, 9 Stat. 922 (Appendix K); Executive Orders relating to the Jicarilla Apache Reservation (Appendix L); Article XI, Section 1, ¶¶(a)(3) and (e) of the Revised Constitution of the Jicarilla Apache Tribe (Appendix M); and the Jicarilla Apache Tribe Oil and Gas Severance Tax Ordinance and accompanying instructions (Appendix N).

STATEMENT OF THE CASE

The Jicarilla Apache Tribe ("the Tribe") resides in an area in Northwestern New Mexico that was ceded to the United States by the Treaty of Guadalupe Hidalgo (App. K) in 1848, after the Mexican-American War. The Tribe was not recognized in the Treaty as a sovereign entity or mentioned in any other way (App. A at 30a-31a) (Seth, C.J., dissenting from the Opinion of the Tenth Circuit). The Tribal lands were made into a reservation by Executive Order (App. A at 5a; App. C at 3c; App. L). The Tribe is organized under the Indian Reorganization Act of 1934. It is undisputed that no treaty or act of Congress has ever provided expressly that the Tribe has any power to impose taxes of any kind upon non-Indians (App. A at 8a).

Petitioners are engaged in the extraction of oil and gas from the Tribe's reservation lands under various leases issued by the Tribal Council and approved by the Secretary of Interior (App. A at 4a; App. C at 4c). Approximately 80% of the oil and gas extracted from the reservation is delivered at the wellhead into interstate pipelines for shipment and sale outside the State of New Mexico (App. A at 6a, 17a; App. C at 4c). All the leases were executed by the Tribe and approved by the Secretary of Interior prior to enactment of the Tribal Severance Tax Ordinance in 1976. The leases provide for the payment of royalties to the Tribe, and specify that no change may be made in the rate of "royalty or annual rental" without the written consent of both parties. Joint Appendix in the Tenth Circuit at A-189. The leases contain no provision expressly reserving to the Tribe any power to impose taxes upon the lessees. *Id.*

Pursuant to authority granted in 1927 (25 U.S.C. § 398c), the State of New Mexico has taxed the production of oil and gas from the Tribe's reservation since 1937 and collects such taxes from Petitioners.[3]

In 1968, the Tribe adopted a Revised Constitution authorizing the Tribal Council to adopt ordinances imposing taxes and fees on non-members of the Tribe doing business on the reservation (App. A at 5a; App. C at 4c; App. M). In 1976, the Tribal Council adopted an ordinance entitled "Oil and Gas Severance Tax" imposing a tax on "any oil and natural gas severed, saved, and removed from Tribal lands" (App. A at 5a; App. C at 4c-5c; App. N). The Revised Constitution and the Ordinance imposing the tax were approved by the Secretary of Interior, through his delegates (App. A at 5a-6a; App.

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[3] *See* New Mexico Statutes Annotated, §§ 7-29-1 to 7-29-22; §§ 7-30-1 to 7-30 26; §§ 7-31-1 to 7-31-25; §§ 7-34-1 to 7-34-20 (1978); New Mexico Laws 1937, Ch. 103.

C at 4c). The Ordinance and the instructions mailed to lessees specified that the tax applied only to oil or gas "sold or transported off the Reservation" (App. A at 6a; App. C at 5c; App. N at 2n, 6n). The Ordinance also expressly consented to the jurisdiction of the United States District Court for actions concerning the tax (App. A at 7a; App. N at 5n).

Petitioners Amoco and Marathon brought an action in the United States District Court for the District of New Mexico seeking a declaratory judgment that they were not liable for the payment of any severance tax and a permanent injunction against collection of the tax.[4] Jurisdiction of the District Court was invoked under the Fifth Amendment and 28 U.S.C. §§ 1331 and 1343(4). The District Court held that the severance tax imposed by the Tribe was "illegal, unconstitutional, invalid and void" and issued a permanent injunction prohibiting enforcement of the taxing ordinance (App. C at 8c; App. D).[5] On appeal, the Court of Appeals for the Tenth

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[4] Petitioners also sued the appropriate New Mexico official requesting a declaratory judgment as to the validity of the New Mexico tax in the event that the Tribal severance tax should be upheld. Since the District Court found the Tribal tax invalid, it was not necessary to consider Petitioners' claims against the state, and they were dismissed without prejudice and with leave to refile in the event that the final judgment in this case should reinstate the Tribal tax. Meanwhile, Petitioners are paying the state tax under protest and have filed statutory refund suits which are being held in abeyance pending final judgment in this case.

[5] The grounds for the District Court's holding were that (1) neither tribal sovereignty nor the Indian Reorganization Act of 1934 empowers the Tribe to enact the tax; (2) 25 U.S.C. § 398c grants the State of New Mexico the exclusive right to tax lessees; and (3) the tax discriminates against and constitutes a multiple burden on interstate commerce in violation of the Commerce Clause (App. C at 7c-8c).

Circuit, sitting en banc, reversed, with two members dissenting.

The Court of Appeals held: First, that the Tribe has power to impose a tax upon non-Indians for the severance of oil and gas from its Executive Order reservation lands without benefit of express authorization in a treaty (App. A at 8a-16a); second, that the Tribe's power to tax was not preempted by the Act of Congress (25 U.S.C. § 398c) expressly authorizing the states to tax the same activity or by the comprehensive congressional regulation of mineral leasing on Indian reservations (App. A at 20a-26a); and third, that the Tribe's tax did not violate the Interstate and Indian Commerce Clause either by discriminating against interstate commerce or by imposing a multiple burden upon such commerce (App. A at 16a-20a).[6]

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS EXCEPTIONALLY IMPORTANT QUESTIONS OF FEDERAL INDIAN LAW WHICH NEED RESOLUTION.

The Court of Appeals recognized that this case presents exceptionally important questions of federal Indian law, which have not been previously considered by this Court,[7] concerning the power of Indian tribes to tax non-

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[6] The Court of Appeals also held that the Trial Court was without power to enjoin the Secretary of the Interior and that it had jurisdiction over the Tribe (App. A at 6a-8a).

[7] The Court of Appeals expressly recognized that this case presents issues of first impression. App. A at 9a, 14a, 16a. The Court also recognized the exceptional importance of these issues by its *sua sponte* decision to rehear the case en banc before the three members of the panel had published any decision. *See* Fed. R. App. P. 35.

Indian lessees who extract oil or gas from Indian reservation lands for shipment in interstate commerce. The case presents a fundamental conflict between the Congressional grant to the states of power to tax extraction of oil and gas from Indian reservation lands, and the recent and spreading assertions by many Indian tribes of power to tax the same activities. Also present are fundamental questions of first impression concerning whether, and how, Indian taxation is limited by the Interstate and Indian Commerce Clause of the Constitution.[8]

The importance of these questions is heightened by this Court's intervening decision on Indian taxing power in *Washington, et al.* v. *Confederated Tribes of the Colville Indian Reservation, et al.* (hereinafter cited as "*Colville*"), —— U.S. ——, No. 78-630, decided June 10, 1980. That decision neither considered nor resolved the issues presented here, and the further guidance of this Court is needed because these issues are of considerable importance to those producing oil and gas from reservation lands, to the tribes, the energy consuming public, and the states. The Jicarilla severance tax is only one of a series of recently enacted Indian mineral taxes[9]

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[8] As the Tenth Circuit stated, "[i]t appears that no court has analyzed how the tribes are limited in their taxing power by the Indian Commerce Clause" (App. A at 16a).

[9] In addition to the Jicarilla severance tax, the Navajo Tribe enacted "possessory interest" and "business activity" tax ordinances in 1978; both will affect mineral production. See Amicus Brief of Navajo Nation in the Tenth Circuit, Exhibit B-2. The Crow Tribe enacted a coal severance tax in 1976. *See* Amicus Brief of National Congress of American Indians, Inc., *et al.* in *Colville, supra*, at 20. The Shoshone and Arapahoe Tribes of the Wind River Reservation enacted a severance tax in 1978, which became effective in 1980, after the decision of the Tenth Circuit in this case. One suit chal-

representing a significant departure from the status quo.[10] Many cases challenging these new taxes are pending in the lower federal courts,[11] and the issues presented

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lenging this tax is already pending. Any tribe that has leased mineral resources for development can be expected to enact mineral taxes in the wake of the Tenth Circuit decision here.

[10] Although New Mexico has been taxing oil and gas production since 1937 (*see* note 3 *supra*), the Jicarilla Severance Tax Ordinance was not enacted until 1976 (page 3 *supra*). Tribal attempts to tax mineral production are of very recent origin. The Final Report of the American Indian Policy Review Commission (hereinafter "AIPRC Final Report") acknowledged that as of the date of the Report (1977), Indian Tribes usually received royalties but not taxes from mineral production. 1 AIPRC Final Report 344. The Report recommended tribal enactment of such taxes, and repeal of 25 U.S.C. §§ 398 and 398c in order to permit tribal taxation. 1 AIPRC Final Report 174, 181, 347. The recent origin of these Indian mineral taxes is further evidenced by recent law review articles, written by Indian advocates, urging the adoption of such taxes and attempting to marshal legal arguments in their support. *See* Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians*, 40 Law & Contemp. Probs 166 (1976); Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands*, 124 U. Pa. L. Rev. 491 (1975).

[11] The Navajo taxes are under challenge in a number of lawsuits. *See* Exhibits to Amicus Brief of Navajo Nation in the Tenth Circuit, and Amicus Briefs of Salt River Project Agricultural and Power District, *et al.*, and National Congress of American Indians, Inc., *et al.* in *Colville*, *supra*. The Amicus Brief of the Navajo Nation in the Tenth Circuit (p. 2) stated that six actions are presently pending in U.S. District Courts challenging the validity of the tax. One suit has been briefed and awaits argument in the Ninth Circuit. *Salt River Project* v. *The Navajo Tribe of Indians*, Nos. 78-

here will be present in most of those cases. Consideration and decision by this Court now will provide a helpful guide to the lower courts in deciding the difficult questions arising in this "vexing area," [12] and may likely obviate many of the disputes. The issues are clearly drawn; the importance of the questions and the inflation and energy crises also require this Court's intervention now.

The Jicarilla tax imposes a significant burden on the prices of oil and natural gas.[13] Indian mineral taxes will inevitably either cause further increases in the cost of energy to consumers, or discourage production from marginal wells and mines on Indian lands,[14] or both. Furthermore, because any significant increase in the taxes imposed upon the activity of severing oil and gas must

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3492 and 79-3028, consolidated. Another case was recently decided in Utah. *Southland Royalty Company* v. *Navajo Tribe*, Nos. C-79-0140, -0153, -0237, -0296 (D. Utah June 5, 1980) (following the Opinion of the Tenth Circuit in this case).

[12] *Colville*, Slip Op. at 1.

[13] The Jicarilla tax is 5 cents per million BTU of gas and 29 cents per barrel of oil. App. N at 2n. This amounts to 29 percent of the interstate price of old gas and over 12.5 percent of the price of old oil. The tax will yield over $2,000,000 annually to the Tribe. App. A at 6a; App. C at 5c, 6c.

[14] For example, the District Court found that producers would have the right under their contractual provisions to pass most of the burden of the Tribe's tax onto their consumers—which would inevitably increase the prices paid by those consumers—but that if the producers were required to absorb the tax it would substantially limit their ability to operate profitably some of the existing wells, requiring them to shut down such wells. App. C at 5c-6c.

affect the economics of further development and extraction,[15] Indian mineral taxes—unlike the Indian taxes on cigarette sales recently sustained in *Colville*—may adversely affect the states' interests in exercising their Congressionally granted power of taxation of oil and gas production from reservation lands. If the Indian taxes are valid, the states must necessarily reduce their taxes or forego tax increases.[16]

The importance of the issues presented is also emphasized by the extensive mineral resources on Indian lands and the avowed purposes of Indian mineral taxation. Indian reservations contain vast amounts of oil, gas, coal, and uranium, constituting significant percentages of the total known reserves of the United States.[17] Apart from

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[15] *See* F. Jones, *The Struggle for Equitable Taxation of Mines—The New Mexico Example*, 16 Rocky Mt. Min. L. Inst. 463, 478 (1971).

[16] Accordingly, five mineral producing states, including New Mexico, filed amicus briefs below opposing the Tribal severance tax. The four other states were Montana, North Dakota, Utah and Wyoming. As the State of Utah said in its Amicus Brief in the Tenth Circuit (at 7), "If the Tribes are permitted to tax non-Indian producers on Executive Order lands, the States' revenues will be correspondingly eroded because the multiple tax burden resulting from such concurrent tribal and state taxation will certainly curtail oil and gas exploration and production on such lands."

Counsel for the National Congress of American Indians, Inc., admits that the new Crow coal tax, for example, is so high as to price Crow coal out of the market if the Montana taxes on severing coal are valid. *See* Amicus Brief, National Congress of American Indians, Inc., *et al.*, in *Colville*, *supra*, at 20.

[17] Indian reservations contain 3 percent of the known United States reserves of oil and gas and 7-13 percent of known United States coal reserves. In 1974, Indian lands produced 4.4 percent of the total United States production

the obvious purpose of raising revenues, advocates of Indian mineral taxation argue that the new taxes are a "sovereign tool" necessary to enable the tribes to control the rate of extraction of natural resources.[18] Early resolution of the questions presented here is required in order that the tribes, the states, the producers, and the nation may know to what extent development and extraction of urgently needed energy resources may be subjected to the differing development philosophies of the tribal councils of those tribes (among the 287 in this country)[19] having minerals under lease or available for lease.

The Commerce Clause issues themselves demand early resolution. The Tenth Circuit noted that the application of the Interstate Commerce Clause to Indian taxation of non-Indians is a question of first impression and that there are no decisions of this Court to guide the lower courts in resolving these difficult issues (App. A at 16a). This case presents the issues of whether—and how—the Indian and Interstate Commerce Clause limits Indian taxation of minerals which move at severance into interstate commerce. The resolution of these issues will directly affect the national interest in maintaining the free and unrestricted flow of commerce in vital energy resources.

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of oil and gas, 4.9 percent of the total United States phosphate production, and 100 percent of the uranium produced on lands subject to federal control. *See* 1 AIPRC Final Report 7, 338-339 (1977).

[18] *See* Brief in Chief of Secretary of Interior in the Tenth Circuit at 22-23, 27, arguing that the "sovereign" right to tax is necessary to "restrict depletion" of the Tribe's mineral resources and to protect those resources from state and corporate "encroachment." *See also* 1 AIPRC Final Report 179. The second paragraph of the Preamble to the Jicarilla Tax Ordinance recites that the Tribe has the obligation to develop its resources on "sustained yield principles" for the general welfare of the Tribe as a whole (App. N at 1n).

[19] *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 n.21 (1978).

II. THE COURT OF APPEALS' OPINION CONFLICTS WITH THE PRINCIPLES OF *COLVILLE* IN FAILING TO RECOGNIZE THAT 25 U.S.C. § 398c HAS DIVESTED ANY POWER OF TRIBAL TAXATION, AND THAT OVERRIDING NATIONAL INTERESTS WOULD BE FRUSTRATED BY TRIBAL TAXATION OF OIL AND GAS PRODUCTION.

In *Colville* this Court held that Indians had power to tax transactions occurring on their lands and significantly involving their interests unless "divested of it by federal law" or by necessary implication because exercise of the taxing power would be "inconsistent with the overriding interests of the National Government." [20] Substantial questions are presented whether tribal taxing power is divested here on both scores.

The conflicting claims of the states and the Indian tribes to the benefits of severance of oil and gas on Executive Order reservations—unlike the state and tribal cigarette taxes at issue in *Colville*—have been extensively discussed and regulated by Congress. In the Act of March 3, 1927, 25 U.S.C. §§ 398a-e (1976) ("1927 Act") (App. H), Congress balanced these conflicting claims by expressly granting to the states—not the tribes—power to tax the entire output of oil and gas on Executive Order reservations while granting to the tribes the royalty interest in this output. In this and subsequent legislation [21] Congress has created a comprehensive scheme to expedite and regulate oil and gas leasing and production on Executive Order reservations and to divide up the benefits of such production. Substantial questions accordingly arise as to whether any tribal power to tax oil and gas production by non-Indian lessees on Executive Order reservations

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[20] Slip Op. at 15-16.

[21] General Leasing Act of May 11, 1938, 25 U.S.C. §§ 396a-f (1976) ("1938 Act") (App. J).

has been "divested . . . by federal law" or would be "inconsistent with the overriding interests of the National Government." *See Colville, supra*, Slip Op. at 15-16.

The 1927 Act settled a controversy arising from what this Court has called the "consistent . . . understanding" of the executive department that "the rights and interests which the Indians enjoyed in executive order reservations were different from and less than their rights and interests in treaty or statute reservations." *Sioux Tribe* v. *United States*, 316 U.S. 317, 327 (1942).[22] Acting on that understanding, the Department of the Interior had taken the position that Executive Order Indian reservations were subject to leasing as public domain (49 L.D. 139 (1922)), and various leases and prospecting permits were issued for such lands under the Mineral Leasing Act of February 25, 1920 (41 Stat. 139). Attorney General Stone subsequently took a contrary view (34 Op. Att'y Gen. 171, 181 (1924)), but the validity of public domain leasing was upheld by the District Court in Utah.[23] Congress then resolved the matter by the 1927 Act.

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[22] The Court held in *Sioux Tribe* that the interest which the Indians received in Executive Order reservations was "subject to termination at the will of either the executive or Congress" without payment of compensation because the executive acting alone was without power to create a compensable interest in public lands. 316 U.S. at 331. *Accord, Confederated Bands of Ute Indians* v. *United States*, 330 U.S. 169, 176 (1947); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 103 (1949).

[23] *United States* v. *Harrison*, Equity No. 8288, discussed in H.R. Rep. No. 1791, 69th Cong., 2d Sess. 5 (1927). The Court of Appeals certified questions to this Court, but the case

The legislative history reveals that Congress could not have intended that the power of taxation could be exercised by the tribes, as well as the states.[24] Instead, the 1927 Act was a carefully crafted compromise taking into account competing claims advanced by advocates of the states, the tribes and the persons who had applied for and obtained permits in reliance on the Department of the Interior's 1922 ruling.[25] Thus, Sections 1 and 2 of the Act (25 U.S.C. §§ 398a-b) authorized the leasing of Executive Order reservation lands with royalties to be paid to the benefit of the Indians while at the same time Section 3 (25 U.S.C. § 398c) granted to the states power to tax "the entire output of oil and gas" [26] includ-

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was dismissed by stipulation on March 14, 1927, following passage of the 1927 Act. *See United States* v. *Ed. McMahon* [*Harrison*], 273 U.S. 782.

[24] *See* App. A at 52a-54a (Barrett, J., dissenting from the Opinion of the Tenth Circuit).

[25] *See, e.g.*, H.R. Rep. No. 1791, *supra*, at 3, 6; S. Rep. No. 1240, 69th Cong., 2d Sess. 3, 5 (1927); 67 Cong. Rec. 10915, 10919 (1926) (remarks of Senator Bratton) (indicating that the proposed legislation would give all the royalties to the tribes and would give the states the power to tax in lieu of a share of the royalties); S. Rep. No. 768, 69th Cong., 1st Sess. 6 (1926) ("It has been deemed advisable to pay all the royalty income to the credit of the Indians and to permit the State to levy taxes on the entire production within its borders the same as upon unrestricted lands."); H.R. Rep. No. 763, 69th Cong., 1st Sess. 9 (1926); 66 Cong. Rec. 5433 (1925) (remarks of Congressman Hayden) ("Each House had previously agreed that a share of the benefit to come from the development of oil, gas and other minerals on unallotted Indian lands within Executive order Indian reservations should go to the State. Whether the State should have the right to directly collect a tax or whether a share of the rental or royalty should be paid in lieu of the tax was the issue . . . .").

[26] H.R. Rep. No. 1791, *supra*, at 4.

ing the "share obtained for the Indians as bonuses, rentals and royalties." Section 5 (25 U.S.C. § 398e) provided for the protection of prior permittees and applicants.

The Tenth Circuit opined that in passing the 1927 Act, Congress "simply did not think of the issue" of tribal taxation, but concluded that if it had, such taxation would have been permitted because the "majority . . . obviously thought that all benefits from the minerals on the reservations belonged to the Indians." [27] This conclusion flies in the face of the statute and the legislative history.[28]

The balance struck in the 1927 Act—giving the Indians the bonuses, rents, and royalties, and granting the states the power to tax "the entire output of oil and gas," [29] including the "share obtained for the Indians as bonuses, rentals, and royalties"—would be upset by recognition of a tribal power to tax the same production. The use of such power by the tribes could greatly impair

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[27] App. A at 22a.

[28] During the four years of extensive legislative activity that led to the 1927 Act, it was apparently not once suggested by any of those debating the moral and legal rights and interests of Executive Order tribes with respect to minerals underlying their reservations that such tribes would not only receive the royalties but also have power to tax non-Indian lessees for the same output the states were expressly authorized to tax. *See* S. 876, 68th Cong., 1st Sess. (1923); 66 Cong. Rec. 998-99 (1924); 66 Cong. Rec. 2233-2234, 5432-34 (1925); H.R. Rep. No. 1254, 68th Cong., 2d Sess. (1925); H.R. Rep. No. 763, *supra*; S. Rep. No. 768, *supra*; 67 Cong. Rec. 10912-10925, 11379-11397, 11528-11530, 12641 (1926); H.R. Rep. No. 1791, *supra*; S. Rep. No. 1240, *supra*; 68 Cong. Rec. 4569-4581 (1927).

[29] *See* note 26 *supra*.

the ability of the states to raise revenues through taxation.[30]

Furthermore, 25 U.S.C. § 398c is only a part of the fabric of federal laws concerning production of oil and gas from Indian lands. 25 U.S.C. § 396a-f, enacted in 1938 (App. J), regulates the entire process of leasing reservation lands for oil and gas mining purposes; § 396d provides that "[a]ll operations" of lessees of restricted Indian lands are subject to rules and regulations promulgated by the Secretary of Interior. Pursuant to this authority, 25 C.F.R. § 171.1 to 171.30 (1979) contain comprehensive regulations governing the leasing process and production operations. The forms of the leases are prescribed by the Secretary. 25 C.F.R. § 171.30. The pervasive federal regulations evidence a long-standing Congressional policy favoring leasing and development of oil and gas reserves on Indian lands.[31] That federal policy

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[30] *See* pages 8-9 & note 16 *supra*.

[31] These pervasive federal regulations, especially when considered with 25 U.S.C. § 398c, raise serious questions concerning whether Congress could have intended to allow the imposition of additional burdens on lessees in the form of tribal taxes. *Cf. White Mountain Apache Tribe* v. *Bracker*, —— U.S. ——, No. 78-1177 (June 27, 1980). The Court of Appeals dismissed the fabric of federal leasing statutes and regulations because 25 U.S.C. § 396b allows Indian Reorganization Act ("I.R.A.") tribes themselves to lease oil and gas lands without participation or approval by the Secretary of Interior. App. A at 23a-25a. However, the statutes are not so easily ignored. The Jicarillas have not attempted to undertake leasing "on their own." Any I.R.A. tribe desiring to take advantage of 25 U.S.C. § 396b and assume control of the leasing process must specify the procedures for leasing in its constitution or charter, and the constitution or charter must be approved by the Secretary under 25 U.S.C. §§ 476-477. *See* 60 I.D. 331 (1949). Thus, the fact that the Jicarillas *could* displace the federal leasing and regulatory process if

is consistent with the present overriding national interests in promoting exploration for and development and extraction of domestic oil and gas reserves.[32] These overriding national interests clearly would be frustrated by tribal taxation, particularly where such taxation is urged by its proponents as a "sovereign tool" to restrict the rate of extraction.[33]

In sum, the Tenth Circuit failed to recognize or appreciate the importance of the federal interests affected by the proposed tribal tax. The teachings of *Colville* mandate a conclusion that overriding federal interests would be frustrated by permitting the tribal tax, and that the Jicarilla Tribe has been divested of the power to impose *this* tax by federal legislation and by necessary implication of its dependent status.

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they would adopt the required constitution and obtain Secretarial approval is hardly an invitation to ignore the federal policies *presently* existing and applicable to the Jicarilla leases. Those policies are inconsistent with and would be frustrated by the Tribal tax.

[32] President Carter said in his State of the Union Address, January 23, 1980, 126 Cong. Rec. H. 166, H. 168 (daily ed.):

> "Our excessive dependence on foreign oil is a clear and present danger to our nation's security.
>
> The need has never been more urgent.
>
> * * * *
>
> The single biggest factor in the inflation rate last year . . . was from one cause, the skyrocketing prices of OPEC oil. We must take whatever actions are necessary to reduce our dependence on foreign oil—and at the same time reduce inflation."

These national interests are also reflected in legislation. Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. §§ 791 *et seq.*; Natural Gas Policy Act, 15 U.S.C. §§ 3301 *et seq.*

[33] *See* pages 9-10 & note 18 *supra.*

III. WHETHER THE POWER TO EXCLUDE NON-MEMBERS FROM THE RESERVATION INCLUDES THE POWER TO TAX PRODUCTION BY MINERAL LESSEES ON EXECUTIVE ORDER RESERVATIONS IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The power to tax recognized in *Colville* appears to be based on the power to exclude non-members from the reservation or attach conditions to their entry. This is the conclusion of the attorney generals' and solicitor's opinions relied upon by the Court in *Colville*:

> "Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe *and over non-members*, so far as such non-members may accept the privileges of trade, residence, etc., to which taxes may be attached as conditions."

Colville, Slip Op. at 16 (emphasis the Court's). *Morris* v. *Hitchcock*, 194 U.S. 384, 393 (1904) upheld the permit tax there imposed specifically on the power to exclude recognized by treaty and the Curtis Act. The lower federal court cases also cited in *Colville* (Slip Op. at 16) and relied upon by the Court of Appeals (App. A at 13a) again involved permit or license taxes imposed as a condition of entry. In *Colville*, the Court noted that the relevant treaties "can be read to recognize inherent Tribal power to exclude non-Indians or impose conditions on those permitted to enter. . . ." Slip Op. at 19. The taxes imposed here, however, are far different from those imposed in *Colville* or in *Morris* v. *Hitchcock*, and the Court of Appeals clearly erred in concluding that there was "no essential difference" between the taxes here levied and those approved in *Morris* v. *Hitchcock* (App. A at 15a).

The tribal cigarette tax upheld in *Colville* is easily justified by the power to exclude non-Indians. However, the instant tribal severance tax cannot be so justified. Unlike the cigarette purchasers in *Colville*, who had no prior contract, Petitioners were previously permitted entry to the reservation pursuant to their leases, approved by the Secretary of the Interior, which attached conditions to such entry (payment of bonus, rental, and royalties) and prohibited any increase in royalties without the written consent of both parties. The right to levy a severance tax was not reserved. The subsequent levy of that tax in practical effect unilaterally increases the royalties, contrary to the terms of the leases. Surely, the status of the Jicarilla Tribe does not permit it thus to ignore its contracts.[34] At the very least, the prohibi-

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[34] If such a tax were imposed by a state or the federal government under similar circumstances, it would raise serious problems under the contract clause or the due process taking clause of the Fifth Amendment. *See Puerto Rico* v. *Russell & Co.*, 315 U.S. 610 (1942) (indicating that when a local government contracts to provide natural resources for a given consideration, it cannot change the value of that consideration by later imposing a special tax on those with whom it has contracted); *Murray* v. *Charleston*, 96 U.S. 432 (1877) (a State may not restrict its own contractual obligations under the guise of levying taxes on the subject of the contract); *cf. Perry* v. *United States*, 294 U.S. 330, 350-54 (1935) (construing "taking" under Fifth Amendment as broadly as "impairment" under Contract Clause); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 21-30 (1977) (criteria for determining whether a state has violated the Contract Clause). *But see J. W. Berry Co.* v. *City of Norfolk*, 220 U.S. 472 (1911); *Chicago Theological Seminary* v. *Illinois*, 188 U.S. 662, 672 (1903) (grants of exemption from state taxation will not be implied); *Wells* v. *Savannah*, 181 U.S. 531 (1901).

Such a "taking" in violation of existing contract rights would violate due process and contract clause principles made applicable to Indian tribes by the "taking" clause of the Indian Civil Rights Act, 25 U.S.C. § 1302(5) (1976), as well as

tion against unilateral increases contained in the leases suggests a federal policy inconsistent with this subsequently imposed Tribal severance tax.

Since this Tribal severance tax cannot be justified by the power to exclude, some other basis must be found. There are substantial questions whether any such basis exists, and *Colville* gives little guidance on the point. One of the reservations in *Colville* was an Executive Order reservation, but it is doubtful that the power to tax can be based solely on the existence of an Executive Order reservation or any theory that the Jicarillas "own" the minerals therein. The "title" of the Jicarillas is of a peculiar and limited character. They have the right of occupancy subject to the plenary power of Congress to control use; they are tenants at will whose tenancy can be terminated without compensation. *Sioux Tribe* v. *United States*, 316 U.S. 317, 327 (1942); *United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676, 686-87 (9th Cir. 1976). Prior to the 1927 Act, minerals underlying Executive Order reservations had been leased as part of the public domain, with the tribes receiving nothing, as explained in Part II above. Even a fee owner cannot, without some powers of government, "tax" existing mineral leases. Thus, the claimed right of the Jicarillas to impose the severance tax cannot spring from some concept that they "own" the minerals.[35]

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the commerce clause principles discussed at pages 20-25 *infra*. *Cf. Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56-57 (1978).

[35] Conversely, an Executive Order reservation can justify taxation under the power to exclude, as was held in *Colville*. Whatever "title" an Executive Order bestows, it at least grants the right of occupancy which alone is sufficient to exclude non-Indians and to attach conditions to their entry, such as the payment of a tax on cigarettes purchased while on the reservation.

Nor can support for the tax be easily found in some general sovereign power over non-Indians. As noted by Chief Judge Seth's dissenting opinion (App. A at 30a-33a), the Jicarillas had not exercised any such power during the Spanish or Mexican occupations, and no such power was granted to them in the Treaty of Guadalupe Hidalgo. Moreover, any such general governmental power —to impose taxes apart from attaching them as conditions to entry—would raise grave questions concerning constitutional limitations on that power [36] and would seem to be a power "inconsistent with [the tribes'] status." *See Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

The Court of Appeals erred in concluding that the "power to exclude" justifies this severance tax. This Court should decide whether tribes, especially those occupying Executive Order reservations, have any power to levy severance taxes where the "power to exclude" is inapplicable.

IV. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FIRST IMPRESSION AS TO THE LIMITS PLACED ON TRIBAL POWER TO TAX NON-INDIANS BY THE INTERSTATE AND INDIAN COMMERCE CLAUSE.

Under the Interstate and Indian Commerce Clause, the Tribe's Oil and Gas Severance Tax is invalid if it unduly burdens "Commerce . . . among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. As the Court of Appeals noted,[37] the present case

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[36] Indian "tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority," *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978), at least when dealing with their own members.

[37] App. A at 16a.

is the first to require the courts to analyze the scope of the limitation on tribal taxation arising from the Indian Commerce Clause.[38] The case also presents a novel issue under the Interstate Commerce Clause, since commerce is impeded not by action of a state, but by that of an Indian tribe.[39] The many lower courts now considering challenges to the validity of the growing number of tribal taxes[40] need guidance from this Court as to the constitutional limitations upon discriminatory or burdensome tribal taxation. The need for direction is especially acute in light of the major impact such taxes will have upon the cost and supply of fuels vital to the nation's well-being.

A. The Tribal Tax Discriminates Against Interstate and Indian Commerce.

The Court of Appeals has misconstrued the Tribe's Ordinance and the decisions of this Court in holding that the tax does not discriminate against interstate commerce and Indian commerce. The severance tax by its terms applies only to oil and gas "sold or transported off the Reservation."[41] The tax thus discriminates on its face

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[38] The Court in *Colville* recognized that the Indian Commerce Clause may have a "role to play in preventing undue discrimination against, or burdens on, Indian commerce." Slip Op. at 20.

[39] The Court of Appeals believed that, while the Tribe's taxation was not "subject directly" to the negative implications of the Interstate Commerce Clause because a tribe is not a state, traditional analysis under the Interstate Commerce Clause should be pursued to determine "whether a tribe's tax legislation infringes upon the national interest in maintaining the free flow of interstate trade" (App. A at 16a). As noted herein, we believe this tribal tax contravenes both Clauses.

[40] *See* pages 6-8 & notes 9-11 *supra*.

[41] *See* page 4 *supra*. The Tenth Circuit's conclusion that this phrase is "ambiguous" and should be read as "sold

between products taken off the reservation and products utilized on the reservation.[42] A tax that imposes a heavier liability upon out-of-state sales than upon in-state sales

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on the reservation or transported off the reservation before sale" (App. A at 19a) is clearly erroneous. Such a reading is contrary to the conclusion of the District Court (App. C at 7c) (Conclusion 6) as well as the clear language of the Ordinance and the instructions mailed to lessees (App. N at 2n, 6n). The Court of Appeals' analysis of the discrimination question (App. A at 17a-19a) is thus of little relevance in light of its fundamental misconception of the clear purpose of the Tribe's tax.

[42] The fact that at present all oil and gas except that used in lessees' operations and that received by the Tribe in kind are sold or transported off the reservation and thus taxed is irrelevant. If the tax is allowed to stand, in the future, as Judge Barrett stated in dissent,

> "those businesses engaged in exclusive *intrastate* refining, marketing and distribution of oil and gas who purchase that portion of the oil and gas retained on the Tribe's land and thus not subject to the Tribal Severance Tax, would enjoy a discriminatory competitive advantage over those businesses supplying the oil and gas produced from the Reservation lands moving into *interstate* commerce. The in-state businesses would not be assessed the Tribe's Severance Tax, while the out-of-state businesses would. The impact would thus be an unequal competitive footing." (App. A at 63a.)

Moreover, any refiner on the reservation itself would be given a competitive advantage over Petitioners. Such a possibility is not mere speculation. The Tribe has announced its intentions to use royalty gas for industry and for agriculture and to enter into the natural gas production and marketing business. Tr. at 257, 271; *Jicarilla Apache Tribe* v. *FERC*, 578 F.2d 289, 290 (10th Cir. 1978); Plaintiff's Amended Proposed Findings of Fact and Conclusions of Law, Proposed Finding No. 78, in *Jicarilla Apache Tribe* v. *Southern Union Gas Co., et al.*, D.N.M. No. CV-75-247M.

and provides "a direct commercial advantage to local business" violates the Interstate Commerce Clause.[43] A similar result should be reached under the Indian Commerce Clause if the reservation line is treated as if it were a state line, since the tax favors those in business on the reservation over those, like Petitioners, engaged in commerce extending across the reservation line.

B. The Tribe's Oil and Gas Severance Tax Imposes a Multiple Burden on Interstate Commerce in That the State of New Mexico Taxes the Same Activity.

This Court has long recognized that state tax statutes that are not apportioned on their face to the value of activities carried on within the taxing state cause the risk of multiple taxation, in that local activities related to interstate commerce may be subjected to a "multiple burden" of taxation to which purely local commerce is not exposed.[44]

The Tenth Circuit has misapplied the Commerce Clause and this Court's decision in *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938), in concluding that since only one "state"—New Mexico—could tax the local event of severance, there is no possibility of multiple taxation. (*See* App. A at 20a.) But the reach

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[43] *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 329 (1977) (quoting *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 457 (1959)); *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 126 (1978).

[44] *See, e.g., Department of Revenue* v. *Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750 (1978); *Standard Pressed Steel Co.* v. *Department of Revenue*, 419 U.S. 560, 563-64 (1975); *J. D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 311 (1938); *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 255-56, 260 (1938); *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U.S. 604, 612-613 (1938).

of the Commerce Clause is not confined to the actions of states alone; it regulates all activities which affect commerce. For example, under the Interstate Commerce Clause, municipal ordinances have been struck down as favoring local residents over out-of-state residents, even in cases in which in-state residents from outside the municipality were subject to the same disadvantage as the out-of-state residents.[45] Where, as here, the taxing authority competing with a state is a "sovereign" Indian tribe, not subject to the control of states over lesser governmental authorities like municipalities, or to the ultimate voting power of the taxpayers, there is even stronger reason for federal scrutiny.

The multiple taxation in this case is unique in that the two bodies that have imposed taxes upon the severance of oil and gas moving in interstate commerce,[46] unlike two geographically separated states, are independent but geographically concentric. Both bodies can claim that they are taxing an activity carried on within the territory of the sovereign, *i.e.*, the severance of the same

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[45] *See, e.g., Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 & n.4 (1951); *West Point Wholesale Grocery Co.* v. *City of Opelika*, 354 U.S. 390 (1957); *cf. Hanley* v. *Kansas City S. Ry.*, 187 U.S. 617, 620 (1903) (implying, in the context of rate setting, that an Indian Territory would be powerless under the Commerce Clause to regulate in a situation where a state would be powerless); *Muskogee Nat'l Tel. Co.* v. *Hall*, 118 F. 382, 384-385 (8th Cir. 1902) (tribe cannot obstruct interstate commerce by giving an exclusive franchise on the reservation if a state could not do so).

[46] There is no serious dispute that Petitioners are engaged in interstate commerce. As the District Court found, some 80% of the oil and gas extracted from the reservation by Petitioners is sold into interstate commerce. *See* page 3 *supra*. This finding was accepted by the Tenth Circuit for purposes of the appeal. (App. A at 17a.)

oil and gas from the same land.[47] Both bodies can claim that the tax is levied only with respect to the value of activities within the taxing jurisdiction, and that, therefore, the tax is automatically "fairly apportioned" and there is no multiple burden on interstate commerce.[48] In these unique and hitherto unexamined circumstances, traditional analysis is inadequate and a new standard must be devised to protect the important commerce involved from such a multiple burden. *Compare Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 452 (1979).[49] Because two "sovereigns" are imposing taxes on a single event, at "full value," *id.* at 447, and a multiple burden has been established that cannot be cured by traditional notions of apportionment, and because the multiple burden disadvantages interstate commerce originating on the Reservation, the tax should fall under the Interstate and Indian Commerce Clause.

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[47] Of course such an argument would assume—contrary to Petitioners' position—that the tax is not on the very process of interstate commerce. *See Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 167 (1954); and *see* App. A at 62a-64a (Barrett, J. dissenting from the Opinion of the Court of Appeals) (reasoning that the tax constitutes an invalid tax on an integral part of the process of interstate commerce since it only applies to oil and gas sold or transported off the reservation).

[48] *See Department of Revenue* v. *Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750 (1978).

[49] If the combined effect of the Indian tax and the state tax is to create a multiple burden, the question of which tax must fall is answered in this case by the Congressional preference for taxation by the states. 25 U.S.C. § 398c.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that a writ of certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit.

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80-15
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

AMOCO PRODUCTION COMPANY and
MARATHON OIL COMPANY,
Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, TREASURER OF THE JICARILLA APACHE TRIBE, and CECIL ANDRUS, Secretary of the Interior,
Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1154

J. GREGORY MERRION and ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, JEROME T. MCHUGH, CHASE OIL COMPANY, DUGAN PRODUCTION CORPORATION, CONSOLIDATED OIL AND GAS, INC., SOUTHLAND ROYALTY COMPANY, TESORO PETROLEUM CORPORATION, AMERADA HESS, SUPRON ENERGY CORPORATION, ENERGY RESERVES GROUP, INC., J. M. HUBER CORPORATION, CONTINENTAL OIL COMPANY, ATLANTIC RICHFIELD COMPANY, PHILLIPS PETROLEUM COMPANY, TENNECO OIL COMPANY, GETTY OIL COMPANY, and GULF OIL CORPORATION,

Plaintiffs-Appellees,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, and CECIL ANDRUS, Secretary of the INTERIOR,

Defendants-Appellants.

MOBIL OIL CORPORATION, and OXY PETROLEUM INC.,
Intervenors-Appellees.

No. 78-1251

AMOCO PRODUCTION COMPANY and
MARATHON OIL COMPANY,
Plaintiffs-Appellees,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, Treasurer of the Jicarilla Apache Tribe, CECIL ANDRUS, Secretary of the Interior,
Defendants-Appellants.

Appeal from the United States District Court
For the District of New Mexico

(D.C. Nos. 77-292P & 77-343P)

Robert J. Nordhaus and Terry D. Farmer, of Nordhaus, Moses & Dunn, Albuquerque, New Mexico, for Defendants-Appellants Jicarilla Apache Tribe, Jicarilla Apache Tribal Council and Gwendolyn Velarde.

Maryann Walsh, Attorney (James W. Moorman, Assistant Attorney General, Sanford Sagalkin, Deputy Assistant Attorney General, Neil T. Proto, Attorney, Peter R. Steenland, Jr., Attorney, Deparment of Justice, with her on the briefs), Washington, D.C., for Defendant-Appellant Cecil Andrus, Secretary of the Interior.

Bruce D. Black of Campbell, Bingaman & Black, P.A., Santa Fe, New Mexico, and Jason W. Kellahin of Kellahin & Kellahin, Santa Fe, New Mexico, for Plaintiffs-Appellees Merrion and Bayless, et al.

John R. Cooney of Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, New Mexico (R. H. Landt of Amoco Production Company, Dener, Colorado, Richard L. Marler of Marathon Oil Company, Findlay, Ohio, Mark B. Thompson, III, of Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, New Mexico, with him on the briefs), for Plaintiffs-Appellees Amoco Production Company and Marathon Oil Company.

George P. Vlassis (Lawrence A. Ruzow, Katherine Ott, Gary Verburg, of counsel) of Vlassis, Ruzow & Crowder, Phoenix, Arizona, filed an amicus curiae brief for the Navajo Nation.

Reid Peyton Chambers of Sonosky, Chambers & Sachse, Washington, D.C. and Marvin J. Sonosky of Washington, D.C., of counsel, filed an amicus curiae brief for the Shoshone Indian Tribe and the Assiniboine and Sioux Tribes.

Charles A. Hobbs of Washington, D.C., filed an amicus curiae brief for National Congress of American Indians, Inc., the Arapaho Tribe of the Wind River Reservation, and the Three Affiliated Tribes of The Fort Berthold Reservation.

Toney Anaya, Attorney General, and Jan Unna, Special Assistant Attorney General, the State of New Mexico, Santa Fe, New Mexico, filed an amicus curiae brief for the State of New Mexico.

Robert B. Hansen, Attorney General, Richard L. Dewsnup, Dallin W. Jensen, Frank V. Nelson, Assistants Attorney General, of the State of Utah, Salt Lake City, Utah, filed an amicus curiae brief for the State of Utah.

John J. Rooney, Acting Attorney General, the State of Wyoming, Cheyenne, Wyoming, Alan I. Olson, Attorney General, the State of North Dakota, Bismark, North Dakota, and Mike Greeley, Attorney General, the State

of Montana, Helena, Montana, filed an amicus curiae brief for the States of Wyoming, North Dakota and Montana.

Before SETH, Chief Judge, HOLLOWAY, McWILLIAMS, BARRETT, DOYLE, McKAY and LOGAN; Circuit Judges (en banc).

LOGAN, Circuit Judge.

This appeal arises out of two suits, consolidated for trial, brought by appellees against the Jicarilla Apache Tribe and its Tribal Council (the Tribe). Appellees (lessees), who are non-Indians, produce oil and gas from within the Tribe's reservation pursuant to leases granted them under the auspices of the Secretary of the Interior. After the Tribe enacted an oil and gas severance tax to be measured by production from oil and gas wells within the reservation, lessees sued the Tribe and Secretary of Interior, Cecil Andrus,[1] seeking a declaratory judgment and injunction that would prohibit enforcement of this tax. After a nonjury trial, the judge permanently enjoined enforcement declaring the tax "illegal, unconstitutional, invalid and void."

The issues on appeal are whether,

(1) the district court had jurisdiction over the claims against the Tribe and the Secretary of the Interior,

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[1] In one of the essentially identical cases Gwendolyn Velarde, Treasurer of the Tribe, and Tony Martinez, Executive Director of the New Mexico Oil and Gas Accounting Commission, were named as individual defendants. Prior to trial Martinez was dismissed from the suit without prejudice.

(2) the Tribe has the inherent power to levy the severance tax,

(3) the tax violates the Commerce Clause of the United States Constitution, and

(4) Congress preempted tribal taxation.

The Jicarilla Apache Tribe is an Indian Tribe occupying an executive order reservation in northwestern New Mexico. The Tribal Council is the legislative arm of the Tribe's government. In 1968 the Tribe adopted a revised constitution pursuant to the Indian Reorganization Act of 1934, §§ 16, 17, 25 U.S.C. §§ 476, 477. Article XI of that constitution provides, in pertinent part,

> Section 1. The inherent powers of the Jicarilla Apache Tribe, including those conferred by Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of the Department of the Interior and the restrictions established by this revised constitution.
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> . . . .
>
> (e) Taxes and Fees. The tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation.

The revised constitution was approved by the Under-Secretary of the Interior in 1969.

In 1976 the Tribal Council adopted an ordinance imposing a severance tax on "any oil and natural gas severed, saved and removed from Tribal lands." The operators are required to pay the tax, which is due at the time of severance and is payable monthly. The tax rate

is assessed at the wellhead per barrel of crude oil and per million BTU of natural gas "sold or transported off the Reservation." "Royalty gas, oil or condensate, taken by the Tribe in kind, and used by the Tribe" is exempt from taxation. The Secretary, through the Acting Area Director of the Bureau of Indian Affairs, formally approved the tribal ordinance in December of 1976.

Among the trial court's findings of fact are the following: Approximately 80% of the oil and gas produced by lessees is shipped interstate for sale outside the state of New Mexico; the tax would generate over two million dollars annually; the lessees would be able to pass the majority of the tax burden on to their customers; if the lessees are required to absorb the tax, the ability of some of the lessees to operate profitably some of the existing oil wells on the reservation would be substantially limited; those lessees not able to profitably operate wells "would be required to shut down such wells resulting in a loss of natural resources and an unjust return of the wells to the Jicarilla Apache Tribe"; and the tax burden on the price of oil and gas would be more than 29% of the interstate price of old gas and over 12.5% of the price of old oil.

Based upon these findings the trial court held that (1) neither tribal sovereignty nor the Indian Reorganization Act of 1934 empower the Tribe to enact the tax; (2) 25 U.S.C. § 398c grants the State of New Mexico the exclusive right to tax lessees; and (3) the tax discriminates against and constitutes a multiple burden on interstate commerce in violation of the Commerce Clause.

I

Before proceeding to the merits, we must consider two jurisdictional questions—whether the trial court had jurisdiction to enjoin the Secretary of the Interior from taking any action to enforce the tax, and whether the court had jurisdiction over the Tribe.

Lessees sued the Secretary on the basis that in approving the Tribe's tax ordinance he violated the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.* The APA is not an independent grant of federal jurisdiction. Califano v. Sanders, 430 U.S. 99, 105-07 (1977). Since only injunctive relief is sought, an action can be maintained against the Secretary under the 1976 amendments to 5 U.S.C. § 702. Appellees admit waiving the defense that the Secretary improperly delegated his approval function to the local official of the Bureau of Indian Affairs. The only arguments made in this Court that the Secretary acted unlawfully under the APA go to the merits of the tax and are treated hereafter.

The Tribe asserts that under the doctrine of sovereign immunity it could not be sued and therefore the trial court was without jurisdiction,[2] citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) and United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940). Those cases clearly hold a tribe cannot be sued absent consent. *See also* Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977). Here the Tribal Council, as the duly constituted legislative body of the Tribe, by the terms of the severance tax ordinance, expressly consented to suits against the Tribe in the United States District Court or in the Jicarilla Apache Tribal Court. The ordinance was approved by the representative of the Secretary of the Interior. The question is whether this constitutes effective consent.

We see no reason in principle or in law to conclude a Tribe that has taken advantage of Congress' encourage-

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[2] The pretrial order recites that the Tribe, pursuant to a resolution of its Council, "waived any claim to sovereign immunity for the determination of the legal validity of this tax." No question of immunity of the Tribe from suit was raised until it filed a reply brief in this Court.

ment to organize for purposes of providing for its common welfare under 25 U.S.C. § 476, has adopted a constitution, and has formally attempted to waive its sovereign immunity in this ordinance, may not do so. We believe the grant of power under the Indian Reorganization Act of 1934 is broad enough to encompass express waiver of sovereign immunity to suit when the ordinance, as here, has been specifically approved by the Secretary of Interior. We therefore hold the trial court had jurisdiction over the Tribe.[3]

II

In treating the merits of this appeal, we first consider the basic question whether the Tribe may impose a tax upon nonmembers of the Tribe doing business within the Tribe's territorial jurisdiction. The tax instituted by the Tribe here is an excise or privilege tax imposed on the occupation of severing oil and gas from tribal land, measured by quantity produced. *See* Ohio Oil Co. v. Conway, 281 U.S. 146 (1930); Flynn, Welch & Yates, Inc. v. State Tax Comm'n, 38 N.M. 131, 28 P.2d 889 (1934). *See also* Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923). Since no treaty or act of Congress specifically authorizes the exercise of such a taxing power, we must decide whether that power is among those "vested in any Indian Tribe or tribal council by existing law," Indian Reorganization Act of 1934, § 16, 25 U.S.C.

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[3] Even were we to conclude the ordinance did not constitute effective consent, it is clear that the court properly reached the merits in one of the cases consolidated for trial. Plaintiffs Amoco Production Company and Marathon Oil Company, in addition to naming the Tribe and Tribal Council as defendants, sued individually the tribal official charged with the enforcement and collection of the tax. The Tribe's immunity from suit does not extend to tribal officials; therefore the trial court properly heard this case. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).

§ 476, *i.e.*, whether the Tribe has the inherent power to levy this tax. In making this determination we recognize the fundamental principle that the power of taxation, which is essential to the very existence of self-government, is an attribute of sovereignty and extends generally to all that is within that government's territorial jurisdiction. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428-29 (1819).

It has long been recognized that Indian tribes, although once self-governing political nations, no longer possess the full attributes of sovereignty. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Nevertheless, the tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." United States v. Mazurie, 419 U.S. 544, 557 (1975); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832). They retain those powers of self-government not voluntarily relinquished by treaty, not divested by Congress in the exercise of its plenary authority over them, or not inconsistent with the superior interests of the United States as a sovereign nation. Oliphant, 435 U.S. at 208-09; United States v. Wheeler, 435 U.S. 313, 323 (1978).

While the Supreme Court has not passed directly upon the question before this Court, it has determined that certain powers were not retained by the tribes upon their incorporation because of the superior interests of the United States. It has long been established, for example, that the tribes, though rightful occupants of the soil, may not convey it at their will, superior title having vested in the United States. Johnson and Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). Because of the United States' interest in protecting its external political boundaries, the tribes as sovereign entities may not deal with foreign nations. The Cherokee Nation v.

Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831). Most recently, the Supreme Court determined that the tribes also gave up the power to exercise criminal jurisdiction over non-Indians, on the ground the power of the tribes to restrict the personal liberty of United States citizens conflicts with the federal government's overriding interest in protecting its citizens "from unwarranted intrusions on their personal liberty." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

We do not find that tribal tax legislation in the context of this case necessarily and in every instance implicates a sovereign federal interest in the same way criminal adjudication, sale of tribal land, and governmental dealings with foreign nations does. The federal taxing power is in no way impinged; clearly the federal government can tax non-Indians or Indians within the reservation whether or not the Tribe levies this tax. Nor is there a general sovereign interest in preventing persons from being taxed by governmental entities other than itself.

A national, if not sovereign, interest in preventing deprivations of property without due process is manifested in the Fifth and Fourteenth Amendments. In the context of taxing, however, that interest is implicated only in the extremely rare case in which the taxing power is so abused the result is in reality not a tax, "but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property." A Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934). *See also* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974); Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910). That is not the situation in the instant case.

Neither can we conclude that the "national interest in free and open trade" between the states, expressed by the Commerce Clause of the Constitution precludes tribal taxation. *See* Boston Stock Exch. v. State Tax Comm'n,

429 U.S. 318, 329 (1977). Just as the clause serves only as a limitation on state taxation powers, *id.* at 329, it limits but does not destroy tribal powers of taxation. *See* Part III, *infra.*

We recognize that in recent decisions bearing on the issue of inherent powers of Indian Tribes, the Supreme Court has occasionally employed language suggesting that Indians are without inherent powers over any non-members of their tribe. *See* Wheeler, 435 U.S at 326; Oliphant, 435 at 208-11. For instance, the Court in *Wheeler* described powers not retained by tribes as those that "would necessarily be lost by virtue of a tribe's dependent status." 435 U.S. at 326. For several reasons we do not believe this language was intended to dispose of a case like the one at issue here.

First, the formulation seems to be merely descriptive of the conclusion that in certain circumstances powers were not retained, and is not a *test* for determining the existence of inherent powers. The critical factor in the cases is whether important interests of the United States other than Congress' basic interest in regulating the affairs of the Indians, conflict with assertions of tribal authority. If the test is whether the asserted tribal power is inconsistent with its dependent status, then the focal point becomes the tribal position, which is *always* one of dependence upon the United States. Carried to its logical conclusion, such a test would mean that a tribe possesses no inherent powers even over its members, because the tribe's very existence would depend upon affirmative enabling legislation by Congress. To the extent a tribe could exert power over its members, that power could only derive from the tribe's existence as a private voluntary association. These conclusions are fundamentally inconsistent, of course, with the teachings of other decisions of the Court. The Court has expressly rejected the contention the tribes are no more than

private, voluntary associations, United States v. Mazurie, 419 U.S. 544, 557 (1975), and has consistently held that tribal powers of self-government are inherent, derived from the tribe's original status as independent sovereign nations. *E.g.*, United States v. Wheeler, 435 U.S. 313, 322-323 (1978); Talton v. Mayes, 163 U.S. 376 (1896).

Also persuasive are Supreme Court decisions to the effect that the tribe's retained powers have at least some elements of territoriality. As early as 1823 the Court recognized in Johnson and Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1923), that voluntary transactions of nonmembers with the Tribes or their members within the confines of the reservation would subject that nonmember, at least regarding that transaction to the laws of the tribe. *Id.* at 593. Similarly, Williams v. Lee, 358 U.S. 217 (1959), held that a state court was without jurisdiction to hear a simple contract action brought by a nonmember against an Indian concerning a transaction entered into on the reservation. The Court's stated rationale was premised in part upon the territorial aspect of the tribe's right to self-government.

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there . . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Id. at 223 (citations omitted). *See also* United States v. Mazurie, 419 U.S. 544 (1975). While the territorial element of inherent tribal power is not necessarily exclusive, *see e.g.*, Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Thomas v. Gay, 169 U.S.

264 (1898), and may not exist in some circumstances, *see* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), we do not think the decisions eliminate this aspect of tribal powers.

We are also persuaded by "the commonly shared presumption of Congress, the Executive Branch, and the lower federal courts," Oliphant, 435 U.S. at 206, that the tribes retain the power to levy a tax that falls upon nonmembers doing business on the reservation. Prior to the Indian Reorganization Act of 1934, 25 U.S.C. § 476 (the Act), which was intended to facilitate tribal self-government, one decision by the Supreme Court and three by the Eighth Circuit approved imposition of tribal taxes on nonmembers doing business on the reservation. *See* Morris v. Hitchcock, 194 U.S. 384 (1904); Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed without opinion*, 203 U.S. 599 (1906); Maxey v. Wright, 105 F. 1003 (8th Cir.), *aff'g* 3 Ind. Terr. 243, 54 S.W. 807 (1900); Crabtree v. Maxey, 54 F. 426 (8th Cir. 1893). The Attorney General of the United States also approved similar taxes. *E.g.*, Cherokee Indians—Export Tax on Hay, 23 Op. Att'y Gen. 528 (1901); Choctaw and Chicasaw Permit Laws, 18 Op. Att'y Gen. 34 (1884).

The parties to this appeal forcefully dispute the characterization of these decisions—the Tribe argues these decisions involved the inherent power to tax; the lessees argue they merely support the proposition that tribes have the proprietary, but not sovereign, right to exact fees from persons desiring to enter the reservation and do business therein. From our reading of the cases and opinions, we conclude that the decisions were grounded upon tribal sovereignty, with the exception of Choctaw and Chickasaw Permit Laws, 18 Op. Att'y Gen. 34 (1884). But two different sovereign powers have been relied upon—the power to tax, *e.g.*, Cherokee Indians—Export Tax on Hay, 23 Op. Att'y Gen. 528 (1901), or the

power to exclude nonmembers from the reservation and set the terms upon which such persons could enter and do business therein. *E.g.*, Buster v. Wright, 135 F. at 950. The Supreme Court in *Morris* v. *Hitchcock* appears to have recognized both theories. 194 U.S. at 389-93.

The case before us presents the bald issue of an Indian tribe's taxing power without benefit of reservations of authority in a treaty. Thus, it seems important to ascertain whether particular treaties influenced the decisions discussed above. Although the United States did not always require tribes to give up the power to exercise civil jurisdiction over nonmembers and their property within the reservation, *see, e.g.*, Jurisdiction of the Courts of the Choctaw Nation, 7 Op. Att'y Gen. 174, 176 (1855), nearly all of these tribes had done so. *See, e.g.*, Morris v. Hitchcock, 21 App. D.C. 565, 593 (1903), *aff'd*, 194 U.S. 384 (1904). Yet throughout the decisions is the sometimes explicit and sometimes implicit assumption that tribal exercise of power over nonmembers doing business on the reservation in connection with that business did not offend the interests of the United States and was a sovereign right retained by the tribes. Two cases decided by the Eighth Circuit after passage of the Act expressly upholding tribal taxes on the theory of the power of taxation share this assumption. Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).

Congress also apparently recognized tribal power to tax nonmembers within the reservation when it passed section 16 of the Act, which confirmed the existence of sovereign tribal powers generally. In hearings conducted prior to passage of the Act, Congress was apprised of the holding of Buster v. Wright, 135 F. 947 (8th Cir. 1905). *See To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes of Local Self-*

Government and Economic Enterprise: Hearings on S.2755 and S.3645 Before The Senate Comm. on Indian Affairs, 73d Cong., 2d Sess. 269-70 (1934). Solicitor Margold of the Department of Interior, in an opinion, considered the intent of Congress in its reference in section 16, to "all powers vested in any Indian tribe or tribal council by existing law." Among those retained powers, he concluded that

> [c]hief among the powers of sovereignty recognized as pertaining to an Indian Tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

Powers of Indian Tribes, 55 Interior Dec. 14, 46 (1934). This opinion, virtually contemporaneous with the Act, is persuasive evidence that neither Congress nor the Department of Interior believed a tribal taxing power would conflict with the interests of the United States. *See also* United States Department of the Interior, Federal Indian Law 435-39 (1958); 1 Final Report of the American Indian Policy Review Comm'n 154-58, 178-82 (1977). Consistent with its interpretation of the Act, the Department approved the tax involved in this case. As the agency charged with construction of the Act in the course of its actual execution, the Department's conclusion that Indian tribes retain the power to levy a tax of the type involved here deserves great respect. *See* Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 660 (1976).

Except for the dollar sums involved, which are irrelevant, *see* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974), we see no essential difference between the privilege taxes here levied and those approved by the Supreme Court in *Morris* v. *Hitchcock* and in the Eighth Circuit cases cited above. For all the reasons discussed

above, we conclude that the Tribe has the inherent power to levy a privilege tax on the occupation of severing oil and gas from reservation land even though the tax falls on nonmembers.

III

We now consider the argument that the severance tax violates the Commerce Clause. The Constitution empowers Congress to "regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S. CONST. Art. I, § 8, cl. 3. We believe the national interest manifested in the Commerce Clause is not sufficient to preclude the tribes' power to tax, but this clause of its own force limits the power of the tribes as well as the states. *See* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 328 (1977). It has long been established that the tribes constitute a separate category within that clause. The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18-19 (1831). Since the tribes are not "states," *see id.* at 16, United States v. Wheeler, 435 U.S. 313 (1978), and necessarily are located within the boundaries of one or more states, they are not subject directly to those doctrines implementing the phrase "among the states."

It appears that no court has analyzed how the tribes are limited in their taxing power by the Indian Commerce Clause. We hold the standard to be used in applying that clause is whether a tribe's tax legislation infringes upon the national interest in maintaining the free flow of interstate trade. Our view is that this national interest is measured by traditional analyses. The trial court found the tax imposed by the Tribe both discriminates against interstate commerce and constitutes a multiple burden on commerce. We treat first the discrimination question.

The trial court's stated reason for holding the tax discriminates against interstate commerce is that the tax

"is levied only against natural gas, crude oil or condensate which is produced on the reservation and sold or transported off the reservation." This reason, which simply tracks the language of the ordinance, can be interpreted in two ways.

The first interpretation is that the tax provides "a direct commercial advantage to local business." Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)). Although there actually is no Indian production here, the ordinance by its terms would apply to any operator engaged in severing the subject resources within the reservation. Apparently, the trial court viewed the provision exempting "[r]oyalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe" as the requisite local preference. We disagree. Subjecting royalty products the Tribe would receive to its own tax would be a fruitless and wasteful act. We therefore think the exemption is permissible.

Second, in view of the trial court's finding that eighty percent of the hydrocarbons produced on the reservation entered interstate commerce, which we accept as true for purposes of this appeal, the court's conclusion of law can mean it believed the tax is to be levied on the privilege of engaging in interstate commerce itself. Were this correct, the standards of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977), and Department of Rev. v. Association of Wash. Stevedoring Cos., 435 U.S. 734 (1978), would be applicable.[4] However, it is settled

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[4] The *Stevedoring* case, building upon *Complete Auto Transit* eliminated the distinction between direct and indirect taxation of interstate commerce when the tax is measured by gross proceeds. 435 U.S. at 743-51. With that distinction fell the *per se* rule forbidding taxation of inter-

that an occupation or privilege tax on the mining or severing of natural resources, although closely connected with interstate commerce, is a local activity properly subject to local taxation. Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923). *See* Dunbar-Stanley Studios, Inc. v. Alabama, 383 U.S. 537, 541 (1969); Alaska v. Arctic Maid, 366 U.S. 199 (1961); Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927). This is true even though the severed product is destined for immediate entry into interstate commerce, Arctic Maid, 366 U.S. at 204; Oliver Iron Mining Co., 262 U.S. at 177-78, and even though the cost of interstate commerce is increased. Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604, 612 (1938). *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288 (1977). The Tribe's tax fits within this line of cases.

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state commerce. *Id.*; 430 U.S. at 287-89. A tax falling within the ambit of these cases is valid if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279. *See id.* at 287; 435 U.S. at 750-51. We need not decide whether a severance tax measured by quantity produced within a single jurisdiction falls within the ambit of this new doctrine. Obviously the questioned tax falls on activity—production—with a substantial nexus with the reservation. The tax does not raise the apportionment problem because it is measured by quantity, and as we have determined, it does not discriminate against interstate commerce. If the *Stevedoring* and *Complete Auto Transit* analysis applied, the only question is whether the tax is fairly related to services provided by the reservation. Lessees did not build a factual foundation in the record to challenge the tax on this ground, since they relied upon the rejected *per se* rule. Thus there is no basis on which to hold the tax invalid on this ground. *See* 435 U.S. at 750-51.

The clear thrust of the ordinance is that the taxable event is severance or bringing the resources to the surface. To be sure, the ordinance's phrase "severed, saved and removed from Tribal lands" is ambiguous, for the taxable event could be removal from the territorial boundaries of the reservation after severance. But we think the phrase "remove from Tribal lands" merely means removal from the soil, as the Tribe argues. This interpretation is reinforced by the explicit requirement that the taxes are due at the time of severance. Nor does the provision that the tax rate is to be applied to oil or gas "sold or transported off the Reservation," alter this conclusion. Although this phrase is also ambiguous, it would seem to mean the tax rate is applied to natural gas and oil that is sold on the reservation or transported off the reservation before sale. The only products not included in the tax computation are those used by the operators in the process of production and those received by the Tribe as royalty in kind. All other products are taxed at the time of severance.

The trial court also held the tax invalid as a multiple burden on interstate commerce, apparently because New Mexico imposes an oil and gas severance tax, as well as an oil and gas emergency school tax, an oil and gas conservation tax, and an oil and gas production equipment ad valorem tax. *See* N.M. Stat. Ann. §§ 7-29-1 to 7-29-22; *id.* §§ 7-31-1 to 7-31-25; *id.* §§ 7-30-1 to 7-30-26; *id.* §§ 7-34-1 to 7-34-20 (1978). The Supreme Court, in Western Live Stock v. Bureau, 303 U.S. 250 (1938), explained the basis for finding this type of violation of the Commerce Clause as follows:

> The vice characteristic of [local taxes] which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed . . . or added to . . . *with equal right by every state which the*

> *commerce touches*, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.

Id. at 255-56 (citations omitted) (emphasis added). Applying this analysis, we hold the trial court erred.

We first note that the focus is upon the type of tax that every state may impose with equal right. It is beyond question that no state, with the exception of New Mexico, has a sufficient connection with the occupation of severing oil and natural gas within the reservation to support levy of a severance tax on lessees' occupation. There is thus no threat of a multiple burden emanating from this tax unless the possibility, which we assume is fact, of New Mexico levying an identical tax constitutes a multiple burden within the meaning of the Commerce Clause. That New Mexico may be able to impose an identical tax on lessees does not implicate the federal interest in maintaining the flow of interstate commerce at all, we believe. Rather it raises two different questions —whether the *state's* tax interferes with the federal interest in regulating the affairs of the Indians, a question we do not reach, and whether a Congressional grant of authority to levy the state tax preempts tribal taxation, addressed in Part IV, *infra.*

We hold the federal interest in interstate commerce, manifested in traditional Commerce Clause analyses, does not limit the Tribe's power to impose this tax.

IV

We next consider whether Congress has preempted the exercise of the Tribe's power to levy the severance tax. The trial court held that by granting to the states the right to tax the production of oil and gas on executive order reservations, Congress intended to preempt similar

tribal taxation. The basis of this ruling is 25 U.S.C. § 398c, which provides:

> Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: *Provided*, That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians.

(Emphasis in original.) Section 398c was an integral element of the Act of March 3, 1927, ch. 299, 44 Stat. 1347, which also settled then unresolved questions concerning the status of Indian mineral rights in executive order reservation lands and granted to the Indians all the royalty, rental and bonus income from oil and gas leases on their reservations. *See id.* § 2, 44 Stat. 1347 (codified at 25 U.S.C. § 398b). *See also* SEN. REP. No. 768, 69th Cong., 1st Sess. (1926); H.R. REP. No. 763, 69th Cong., 1st Sess. (1926).

In construing this statute, we must apply the

> "eminently sound and vital canon," *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655 n. 7 (1976), that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918). See *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *Antoine* v. *Washington*, 420 U.S. 194, 199-200 (1975).

Bryan v. Itasca County, 426 U.S. 373, 392 (1976). Fairly read, this statute does not by its terms preclude tribal taxation of lessees engaged in the business of producing oil and gas from within executive order reservations. Moreover, the legislative history, which reflects Congress' awareness of the need at that time for express authorization of state taxation of Indians and of non-Indians doing business with Indians on the reservation, does not show an express or implied intent to preempt tribal taxation. *See* H.R. REP. No. 1791, 69th Cong., 2d Sess. 4 (1927); SEN. REP. No. 768, 69th Cong., 1st Sess. (1926); H.R. REP. No. 763, 69th Cong., 1st Sess. (1926); 68 CONG. REC. 4569-81 (1927); 67 CONG. REC. 10912-25 (1926); 66 CONG. REC. 2233-34 (1925); 66 CONG. REC. 998-99 (1924).

A careful reading of the legislative history convinces us that Congress simply did not think of the issue when it enacted the statute, even though the Supreme Court and the Eighth Circuit had approved tribal taxation of nonmembers under similar circumstances. *See* Part II, *supra.* There was dispute over whether the Indians should receive all of the royalty income from leases of reservation lands. Legislators who opposed the Act as too generous might well have voted against giving the Indian tribes power to levy taxes, but the majority, who obviously thought that all benefits from the minerals on the reservations belonged to the Indians, might well have voted the other way. At no time when the state taxes were mentioned was there any discussion that the amount of such taxes might be relevant to passage of the Act. We therefore conclude that section 398c, being part of an act passed to benefit the Indians and ambiguous in letter and intent with respect to tribal taxation, does not preempt the tribal tax ordinance at issue in this case.[5]

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[5] The Tribe also argues that New Mexico has no power to levy its severance tax on production within the reservation.

It also may be argued that by virtue of its regulation of the leasing process, Congress preempted independent tribal taxation of those acquiring leases by that process. *Cf.* Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965) (all-inclusive federal regulations and statutes applicable to trading on the reservations with Indians preempt state taxation of traders doing business thereunder). In essence, the argument is that by prescribing the procedures for the acquisition of leases and determining the royalty, bonus and rental payments the Indians are to receive, Congress intended that no burdens other than those embodied in the leases be imposed on the lessees.

When Congress first authorized leasing of land within executive order reservations for oil and gas purposes in the Act of March 3, 1927, ch. 299, § 1, 44 Stat. 1347 (codified at 25 U.S.C. § 398a), it provided that the same rules apply as for leasing oil and gas interests on other types of reservations. *See* 25 U.S.C. §§ 397, 398. Thus, the Secretary of the Interior, with the consent of the tribal council, was charged with the responsibility of conducting a public auction to obtain the best terms pos-

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Its argument in essence is that the General Leasing Act of 1938, ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a-396g), which makes uniform the laws applicable to leasing of mineral rights on Indian reservations, and does not contain a specific grant of power to the states comparable to that found in the Act of March 3, 1927, ch. 299, § 3, 44 Stat. 1347 (codified at 25 U.S.C. § 398c), repealed the latter provision. See § 7, 52 Stat. 347. Because the State of New Mexico is not a party to this litigation and we hold the State's power to tax, if any, is not exclusive, we do not reach this question. For the same reasons we do not address the Tribe's contention that the trial court erred in not allowing the Tribe to put the leases into evidence to show whether they were granted under § 398c or under § 396a.

sible for the Indians. *See* 25 U.S.C. § 398. But in 1938 Congress effected a change in this scheme that is significant for our purposes. The General Leasing Act of 1938, ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a-396g), intended to make uniform the various laws applicable to the leasing of Indian lands for mining purposes and to conform the laws to the purposes of the Indian Reorganization Act of 1934, §§ 16, 17, 25 U.S.C. §§ 476, 477. *See* H.R. REP. No. 1872, 75th Cong., 3d Sess. (1938). Therefore, it elaborated on the procedures to be followed for leasing oil and gas interests. But of greater significance is the proviso found in that section, which allows tribes organized and incorporated under 25 U.S.C. §§ 476, 477 to assume and define for themselves the leasing process.[6]

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[6] 25 U.S.C. § 396b provides:

Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: *Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 464-475, 476-478, and 479 of this title.* (Emphasis added.)

Thus, Congress expressly provided that tribes like the Jicarilla Apache Tribe may, by proper constitutional and legislative means approved by the Secretary of the Interior, *see* 25 U.S.C. § 476, determine the terms upon which they will lease their lands and regulate the operations of their lessees.[7] Under these circumstances we cannot conclude that Congress intended to so occupy the field of regulating leasing of tribal property for oil and gas leases that the Tribes could not impose additional burdens on lessees through exercise of the power of taxation.

The leases themselves contain a provision that no change may be made in the rate of "royalty or annual rental" without written consent of the parties to the lease. But as lessees acknowledged at oral argument, such a provision does not preclude a sovereign that is also a lessor from imposing a tax which has the practical effect of increasing its revenues. It is well settled that such an agreement does not prevent the exaction of a license tax "unless this right has been specifically surrendered in terms which admit of no other reasonable interpretation." City of St. Louis v. United Rys. Co., 210

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[7] The Secretary of the Interior has implemented by regulation the substance of the proviso as follows:

> The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), . . . or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

25 C.F.R. § 171.29 (1979).

U.S. 266, 280 (1908). *See also* New Orleans City & Lake R.R. v. City of New Orleans, 143 U.S. 192 (1892).

We have considered the remaining contentions of the parties and do not find them to be dispositive.

The judgment of the trial court is reversed and remanded with direction to enter judgment in favor of appellants.

McKAY, Circuit Judge, concurring:

While I concur fully in the opinion of the court, I file this statement to emphasize certain considerations dictating the result reached.

As the dissenting opinion of the Chief Judge suggests, the time in history at which one begins his analysis certainly does affect the outcome. For the most complete examination, we should begin in pristine times, or at the very latest with 1788 and the ratification of our fundamental law. At that moment there were at least four, not three, entities recognized by the Constitution. There was, of course, the federal government. There were, of course, the states. There were, of course, foreign nations. And there were "the Indian Tribes." [1]

Beginning with the ratification of the Constitution, it is essential to examine both the actual dealings with the tribes and the language employed in those dealings in order to comprehend the tribes' special status. Even the conquering government characterized them as "nations." The early Supreme Court decisions incorporate those national concepts as, for instance, in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), where Chief Justice Marshall wrote: "[A] weaker power does not surrender its

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[1] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. Const. art. 1, § 8.

independence—its right to self government, by associating with a stronger and taking its protection." *Id.* at 561. Both the language and formality of treaties were employed in defining the tribes' special status. Indeed, "[t]he Indian tribes were recognized as powers capable of making treaties before the United States was." F. Cohen, *Handbook of Federal Indian Law* 274 (1942).

The source of cession of Indian lands is of relatively little consequence. Whether the lands came from the exaggerated claims of dominion asserted by France, Spain, Russia or Mexico, our government continued to treat the Indian tribes with the same essential assumptions. For example, the President negotiated and the Senate ratified a treaty with the Mescalero Apaches—a nation of Indians living within the land ceded by Mexico —only four years after the Treaty of Guadalupe Hidalgo. *See* Treaty with the Apaches, July 1, 1852, 10 Stat. 979 (1852). In no sense, then, were all vestiges of governmental power abolished in the New Mexico tribes. Thus, we see that the Indians were never treated as mere corporations, mere landholders or mere associations. While it is true that Congress did not formally ratify the proposed treaty with the Jicarilla, that fact does not derogate from the general underlying assumptions about the tribe's historic status. A congressional failure to ratify a treaty does not convert a "nation" into a voluntary association. The profile of the tribe's rights, practices and relationships under federal authority properly reflects a status similar to the tribes whose proposed treaties were indeed ratified. "Executive order reservations have exactly the same validity and status as any other type of reservation." F. Cohen, *Handbook of Federal Indian Law* 299 (1942) (citing 34 Op. Att'y Gen. 181, 186-89 (1924)).

Tribes have characteristics of sovereignty not enjoyed by the kinds of proprietary and fraternal bodies which the Chief Judge asserts are most analogous to the tribes.

If we were to deny the importance of sovereignty in our analysis, we would be ignoring the clear dictates of the Supreme Court. *See, e.g., Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172 (1973). Indeed, the Court has consistently held the tribes to have the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 58.

Indian "self-determination" is not in substance the same as that of any voluntary association. *Congress* has explicitly "recognize[d] the obligation of the United States to respond to the strong expression of the Indian people for self-determination." 25 U.S.C. § 450a(a) (1976). And the principle of self-determination may be said to *require* protection of territoriality. *See* McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests*, 13 Harv. C.R.-C.L. L. Rev. 357, 390 & 390 n.154 (1978).

Even though *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), shies away from the prospect of non-Indians answering to Indian tribunals for *criminal* behavior, it nonetheless confirms that tribes enjoy sovereign powers not remotely granted to corporations, voluntary associations, and the like. *Id.* at 208. Those powers may be subject to divestiture by the superior federal power, but such divestiture is implied only if the powers are inconsistent with the tribes' status. *Id.* In a limited area, *Oliphant* found divestiture, but "[i]n most respects the *Oliphant* Court's rationale does not apply to noncriminal cases." Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash. L. Rev. 479, 508 (1979). Tribes clearly do have governmental authority over nonmembers in many instances. For example, "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes

affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 65. *See United States* v. *Mazurie*, 419 U.S. 544 (1975); *Williams* v. *Lee*, 358 U.S. 217 (1959).

The reservation tribes, including the Jicarilla, typically and with congressional approval have operated as governments. There can be no doubt that the federal government, because of the special authority granted it in dealing with the Indians, has the power either to confirm in them or to grant to them typical municipal powers whether they be police powers, regulatory powers or fiscal powers. It simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes. Such taxes certainly do not offend the concerns expressed in *Oliphant* because historically and conceptually these taxes are associated with land, even though the impact may ultimately fall on individuals, Indian or non-Indian.

Finally, because the case is so often cited, I think it important to emphasize that *Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S. 165 (1977), provides no authority whatsoever for the State of New Mexico to assert jurisdiction over Indian reservations. The Chief Judge correctly notes that the case upheld the right of the State of Washington to regulate the netting of steelheads by individual Puyallup Indians. However, unlike New Mexico, Washington had explicitly asserted Public Law 280 "civil and criminal jurisdiction within the [Puyallup] reservation for most purposes." *Id.* at 175, 175 n.14. In addition, in contrast to the Jicarilla reservation, the Puyallup reservation has ceased to exist for all practical purposes. The Puyallups have alienated all but 22 acres of their 18,000 acre reservation, and none

of the remaining 22 acres abuts on the river in question. *Id.* at 174. Furthermore, although the Jicarilla Apaches have not done so, a tribe may voluntarily relinquish some of its jurisdictional rights. In *Puyallup Tribe*, the Court interpreted the relevant treaty as permitting state regulation. *Id.* at 175.

SETH, Chief Judge, dissenting:

I must dissent from the majority opinion for several reasons.

I would begin the analysis of the issues presented in this appeal at a very early date to place the matter in its historical context. Thus, in my view, the consideration of this appeal should *not* start with an analysis of "sovereignty," as the Secretary urges, as this includes too many assumptions and generalizations which are questionable but which nevertheless influence the outcome. As so often happens when a start is made too far along the sequence of events or the development of doctrines the selection of a place to start determines where the writer is going to come out. Thus I would start instead with an examination of the fundamental relationships as they existed initially between the federal government and the Jicarilla Apaches, and this relationship as influenced by the creation of the State of New Mexico.

The Jicarilla Apaches were then and now are in the area ceded to the United States after the war with Mexico. The Treaty of Guadalupe Hidalgo with Mexico in 1848 (9 Stat. 922) contained provisions for the recognition of land titles, and the proprietary interests of the citizens of Mexico within the area ceded. No separate mention is therein made of Indian lands or any recognition given to Indian groups other than border problems. These groups had been under the rule of Spain and of Mexico for two hundred years. They were in an area settled by Spain and Mexico and in frequent contact over

the years. The Pueblo Indians had received grants of land as had non-Indian groups. The Treaty treats all persons within the ceded area in the same way. The Treaty of Guadalupe Hidalgo thus spoke for all persons within the geographical area concerned, as would any treaty. There was no separate treatment of particular areas or groups and there was no reason why there should have been. All persons had been subjects of the Spanish crown and the government of Mexico for several hundred years. The sovereignty was thus *transferred* from the government of Mexico to the United States. This was not an area being occupied by the first foreign sovereign to come on the scene wherein it would be expected that the various groups of inhabitants would be dealt with separately or differently. Instead it was the conclusion of a war between two nations one of which, with its predecessor, had exercised complete authority and sovereignty over the land and all the people for several hundred years. With the end of the war and the peace treaty all the persons in the ceded area who stayed automatically came under the complete authority of the United States. They were thereby transferred from one sovereign to another. The citizenship issues have been treated by a number of authorities and need not be considered here because there is no question as to the complete authority of the new sovereign over all the people as a consequence of the Treaty with Mexico and the position as a successor.

At the end of the Spanish occupation there were in New Mexico and Arizona some six or eight independent Apache tribes. One of these was the Jicarilla Apaches. In 1846 after the period of Mexican sovereignty the Jicarillas numbered about 500 according to Governor Bent. There were then in all ten to twelve groups, each consisting of eight to ten family units, with a total of about forty-five individuals. Albert H. Schroeder, *Apache Indians I* (Garland Publishing Co. reprints, reports and

exhibits) [hereinafter cited as Schroeder]. The basic unit was the family group. There were no clans or gentes. M. E. Opler, referring to the Jicarillas (as quoted by Schroeder), writes:

> "The Tribe was a rather nebulous entity of its members. The band was a man's immediate concern.
>
> . . . .
>
> "They were semi-nomads, following wild food harvests.
>
> . . . .
>
> "The people living in one section of the tribal range would seldom meet their tribesmen of a more distant quarter."

Opler also writes that the local groups would form a loose confederation for social purposes, and for defense or aggression. When the small units banded together for war a leader was accepted by agreement, but each individual was free to come or go at will or reject the leader (Schroeder). As early as 1796 Colonel Don Antonio Cordero, as to all Apaches, reported (per Schroeder): "At present they do not compose one nation of uniform customs, usages and tastes." There was, of course, no central authority for the Jicarillas at any time. Each autonomous group would winter around their geographic landmark near the Sangre de Cristo Mountains, and in summer move about with the availability of food, and move eastward to hunt buffalo. These groups used an area of some 5,000 to 7,000 square miles. *See generally* H.R. Rep. No. 2503 (1953). There was thus self-determination within the socio-religious-family relationships. This went with the small groups wherever they went as it had no geographical significance nor relationship to any other group. There were several small groups who farmed near Taos and Cimarron. For descriptive purposes the Spanish referred separately to the eastern groups, the Sand group, and the more western group.

An eastern group leader was dealt with for a time in the pre-American period.

The Treaty of Guadalupe Hidalgo and the American occupation necessarily displaced all existing authority in the area, and there were then created the only governmental entities in New Mexico which were to exist during the interim period. Thus a new government came on the scene to supplant entirely the old. This was not an unfamiliar event in the history of the world.

Thus with the substitution of the government of the United States for the government of Mexico all the individuals in the area started anew with only their property. Thus there is nothing to build on in New Mexico to create a concept of sovereign power in any group remaining from Spanish or Mexican times. The start is from a zero base with the American occupation for all persons in the area. This new structure was established by the code promulgated by General Kearney in September of 1846. It was a complete code of laws and created the framework of the government with many details. Thus there were no vestiges preserved of any governmental powers whatever in the Indian groups in New Mexico who did not occupy pueblos. The Jicarilla Apaches had no such powers over others, and if they had any they would have been lost by the American occupation.

The act organizing the territory of New Mexico was effective in September of 1850 (9 Stat. 446). This was a skeleton of organization and contained no mention of land ownership nor of the Indians. This was followed by the Enabling Act for the State of New Mexico (36 Stat. 557, Act of June 10, 1910). This Act contains the first reference to the Indians as a group. This Act recognized them only as landowners or possible landowners. The Act as to non-Indians provides in part that "people inhabiting said proposed state" disclaim all proprietary claims to the lands of the United States and of the

Indians. The Act also acknowledges the exclusive jurisdiction in Congress over Indian lands. This disclaimer is by the "people" and only of *proprietary* interests. It has nothing to do with a disclaimer of sovereign power of the state, and again relates only to lands in an attempt to retain the status quo, and the rights under the Treaty of Guadalupe Hidalgo.

The Enabling Act, of course, contemplated the creation of a state under the United States Constitution with the vesting of broad powers in the new state. The Constitution contemplates that the states are to create within their boundaries the counties, parishes, cities and villages. The states thus establish *all* the local bodies and *all* entities having governmental powers within their boundaries. The federal government under its residual powers retained no authority to create governmental bodies within the states. The state-created entities are the ones in which the opportunity for participation extended to all persons within the boundaries. These are the foundation of governmental authority as it exists in the United States. Not only are there no federally created governmental entities within the states provided for by the Constitution, but it also does not contemplate the existence of other "nations" within the boundaries of the United States. Obviously there is no place for them in the governmental structure therein created.

It is significant in this respect that the Court in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, quoted from United States v. Kagama, 118 U.S. 375, the following:

> " 'Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist in the broad domain of sovereignty but these two. There may be cities, coun-

> ties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these.' "

As to the Jicarillas, long after the American occupation legislation began to fill the vacuum as to their internal matters, their relation with the federal government and New Mexico, their money, and their tribal businesses, but all within Constitutional limitations. The place or location in New Mexico to be occupied by the Jicarillas after the American occupation changed several times. There were a series of executive orders promulgated and revoked. Finally, a location was established and the Executive Order recites that a described tract is "set apart as a reservation for the use and occupation of the Jicarilla Apache Indians." This is obviously something other than "ownership" but for our purposes it is no different from any other real estate "owned" by an individual or a group. It is no different from the Spanish and Mexican community land grants existing and recognized in New Mexico from the earliest times. These grants are also managed, used, and owned by groups in a community. The combination of land ownership and self-determination for anyone does not add up to anything more than the elements separately considered. The combination does not create a governmental agency or entity recognized or contemplated by the Constitutions of the United States or of New Mexico.

The sovereignty argument advanced by the Secretary must lose significance for purposes under consideration because non-members of the tribe (including Indian non-members) are excluded from participation. This is an express exclusion based solely on tribal membership. Perhaps this is as it should be for self-determination; however, such a group of tribal members excluding all others cannot exert governmental authority over those excluded. It is obvious that our whole governmental

structure is based on representation with an opportunity to participate. When this is provided authority exists to govern. Here we cannot add the exclusive group of self-determination to land ownership and come out, as to the outsiders, with any thing more than the rights of a private landowner. "Self-determination" for such an exclusive group is in substance what any socio-religious group has in this country, and should have. If such group owns a tract of land, there is the same combination of self-determination and private property which again adds up to private property as to non-members. This is typical of community land grants in New Mexico. The added element as to the Jicarillas is the control by Congress and the limited land "ownership." These for all practical purposes must be negative elements.

The plenary power of Congress over the Indians and their lands is obvious, but it must be recognized as a power "over the Indians" and not a power over non-Indians. The power of Congress over the Indians and their lands cannot include the exercise of such power to diminish the rights of non-Indians. To do so is to exercise plenary power over non-Indians. Thus Congress cannot under the Constitution add sufficient elements or powers to such an exclusive tribal group any more than it can to any other socio-religious group which would enable the members to exercise governmental powers of any nature in New Mexico.

The Secretary here urges that the Reorganization Act added some new ingredient of a governmental nature. Under the Constitution Congress cannot add new governmental entities in New Mexico not theretofore provided for. The federal government cannot by the Reorganization Act or by any other method introduce "nations" or governmental entities within the state. The Reorganization Act is an aspect of the current policy of the federal government seeking to cast self-determination

machinery in a form in which it is accustomed to, and which has a "governmental" appearance. The whole concept of self-determination should be taking place and should have been advanced in years past. All must agree that it is most desirable, and to be valid it must be recognized for what it really is—"self-determination."

It is a mistake to generalize about "Indian rights," wherever the groups may be in the United States, and to disregard the events in their history, in the history of the states where they may now be located, and the events and sequence of such events in the history of the United States. The differences are too great to permit the broad generalizations which are urged on this appeal by the Government or the basic assumptions made therein.

The State of New Mexico under specific federal statutes and under its sovereign powers has extensive jurisdiction within Indian reservations which it may choose to exercise or not to do so. The Supreme Court in Puyallup Tribe v. Washington Game Dept., 433 U.S. 165, considered and upheld the right of Washington State to control the netting of steelheads by individual Indians within the Puyallup Tribe's reservation. *See also* Kake Village v. Egan, 369 U.S. 60.

The Court in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, referred to the many instances where the Court has referred to the limited authority retained by Indian tribes. The Court therein refers to the "quasi-sovereign" reference in The Cherokee Nation v. Georgia, 5 Pet. 1, and then states:

> "But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress

> *and* those powers *'inconsistent with their status.'* " (Emphasis supplied.)

The Court also refers therein to Johnson v. M'Intosh, 8 Wheat. 543, and stated that:

> "We have already described some of the inherent limitations on tribal powers that stem from their incorporation into the United States."

The Court continued:

> "Nor are the intrinsic limitations on Indian tribal authority restricted to limitations on the tribes' power to transfer lands or exercise external political sovereignty. In the first case to reach this Court dealing with the status of Indian tribes, Mr. Justice Johnson in a separate concurrence summarized the nature of the limitations inherently flowing from the overriding sovereignty of the United States as follows: '[T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves.*' " (Emphasis supplied.)

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, is a significant decision by the Supreme Court. It is, of course, directly concerned with the authority of an Indian tribe to exercise criminal authority over a nonmember. The decision, however, carries a parallel analysis and statement of reasons applicable to jurisdiction or power by the Indians over all matters relating to nonmembers. We have above referred to portions of the opinion and the references to other Supreme Court opinions therein contained. The decision represents, together with United States v. Wheeler, 435 U.S. 313, a description of Indian "sovereignty" after all its restrictions and limitations are applied, as authority over members

of the tribe. This is "self-determination" as it now exists. The Court in *Wheeler* said:

> "It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain 'a separate people, with the power of regulating their internal and social relations.' *United States* v. *Kagama, supra,* at 381-382; *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 16."

In a footnote to the above, the Court added:

> "Thus, unless limited by treaty or statute, a tribe has the power to determine tribe membership, *Cherokee Intermarriage Cases,* 203 U.S. 76; *Roff* v. *Burney,* 168 U.S. 218, 222-223; to regulate domestic relations among tribe members, *Fisher* v. *District Court,* 424 U.S. 382; *cf. United States* v. *Quiver,* 241 U.S. 602; and to prescribe rules for the inheritance of property. *Jones* v. *Meehan,* 175 U.S. 1, 29; *United States ex rel. Mackey* v. *Coxe,* 18 How. 100."

The Court in *Wheeler* continued:

> "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."

And again:

> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."

And again:

> "These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. '[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection.' "

These quotations are especially significant when we consider the history of the Jicarillas, and the zero base from which they started into the American occupation. Even in United States v. Mazurie, 419 U.S. 544, the Court referred to the tribe there concerned as possessing "a certain degree of independent authority over matters that affect the internal and social relations of tribal life."

The two principal cases considered—*Oliphant* and *Wheeler*—of course, concerned criminal jurisdiction, but again the reasoning and analysis upon which the decisions are based is equally applicable to other "jurisdiction" or "powers" over nonmembers which would originate with any concepts of governmental status or an aspect of sovereignty. *See also* Puyallup Tribe v. Washington Game Dept., 433 U.S. 165. These several recent decisions, in my view, are determinative of the issue on appeal.

Thus under the most recent cases "Indian sovereignty," if it may be generalized, means self-determination. It means the right of the Jicarillas to control their internal business-governmental affairs relating to tribal members

and, of course, their social and religious affairs. This is added to the usual rights which accompany the ownership of property both real and personal. These rights taken together do not include the taxation power here sought to be exercised. In contrast to the many license cases cited by the parties, if there is a license it is the executed oil and gas lease. The tribe is as any other landowner in relation to the lease for the purposes under consideration.

I would thus affirm the trial court.

BARRETT, Circuit Judge, dissenting:

I

In *Jicarilla Apache Tribe* v. *United States*, 601 F.2d 1116 (10th Cir. 1979), we discussed the unique relationship between the United States Government and the Indian Tribes:

> Since the year 1871, Indian tribes have been subject to the power and authority of the laws of the United States by means of the exercise of its legislative power over them. Prior thereto the various tribes were recognized by the United States as possessing the attributes of separate nations to the extent that treaties were entered into with them. Thus, since 1871 the Congress has regulated Indian affairs and the United States government serves as guardian of the Indian tribes, nations, or bands. *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 23 S. Ct. 115, 47 L. Ed. 183 (1902). It has been said that, in a general way, the relationship now between the United States government and the Indian tribes is that of superior and inferior, in that the government has assumed, in large measure, the care and control of Indians and Indian Tribes. *Montoya* v. *United States*, 180 U.S. 261, 21 S. Ct. 358, 45 L. Ed. 521

(1901). The paradox, so to speak, is that even though Indian tribes have been held to have a [sovereign] status higher than the states they are nonetheless limited in sovereign power to the extent required of them by the superior sovereign, the United States. *Native American Church* v. *Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959).

Congress possesses paramount power over the property of the Indians by reason of its exercise of guardianship over their interests. Thus, plenary authority over the tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one not subject to the control of the judicial branch of government. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 23 S. Ct. 216, 47 L. Ed. 299 (1903). The propriety or justification of action by the Federal Government, legislatively mandated, relative to Indian lands and properties is a political rather than a judicial question and that power is plenary. *Oneida Indian Nation* v. *County of Oneida, supra; United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941).

It is within the power of the Congress to provide that the laws of a state shall extend over and apply to Indian country and activities thereon, where they clearly do not interfere with federal policies concerning the lands. *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685, 85 S. Ct. 1242, 14 L. Ed. 2d 165 (1965); *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962).

601 F.2d at pp. 1125, 1126.

In the exercise of the elusive concept of "tribal sovereignty," the courts have been able to readily define the

limits thereof only if a federal statute or treaty speaks directly to the subject, i.e., the power of an Indian tribe to exercise a particular jurisdiction. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978); *Bryan* v. *Itasca County, Minnesota*, 426 U.S. 373 (1976). Thus, any general federal law fails if it conflicts with or abrogates a tribal treaty right. *United States* v. *Winnebago Tribe of Nebraska*, 542 F.2d 1002 (8th Cir. 1976). The two primary sources of explicit limitations on tribal sovereignty or political independence are treaties and federal legislation dealing with Indians; the Tribes do, however, retain those aspects of "sovereignty" not withdrawn. *United States* v. *Wheeler*, 435 U.S. 313 (1978).

Indian treaties have not been interpreted narrowly, but have been construed so as to generously recognize the full obligation of the United States to protect the interests of a dependent people. *Peoria Tribe of Indians of Oklahoma* v. *United States*, 390 U.S. 468 (1968). Accordingly, all doubtful expressions contained in treaties should be resolved in the Indians' favor, *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970), although the Congress has exclusive plenary legislative authority over Indians and all of their tribal relations. *Lone Wolf* v. *Hitchcock, supra.*

In the instant case there are no treaty rights involved, inasmuch as the Jicarilla Apache Tribe Reservation was carved out of the public domain and withdrawn by Executive order. A tribe occupying lands under a treaty has rights which are contractual in nature; however, a tribe occupying reservation lands by virtue of an Executive Order does so at the will of the Congress. Under either circumstance, i.e., creation of Indian reservations by treaty or Executive order, the exclusive plenary legislative authority of the Congress is superior *when exercised.* The "jurisdictional" problem relating to the appli-

cable law of "Indian country" was discussed in *Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979):

> Before the enactment of the state law here in issue, the Yakima Nation was subject to the general jurisdictional principles that apply in Indian country in the absence of federal legislation to the contrary. Under those principles, which received their first and fullest expression in *Worcester* v. *Georgia*, 6 Pet. 515, 517, state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U.S. 217, 219-220. As a practical matter, this has meant that criminal offenses by or against Indians have been subject only to federal or tribal laws, *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, except where Congress in the exercise of its plenary and exclusive power over Indian affairs has "expressly provided that State laws shall apply." *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 170-171.
>
> 439 U.S. at pp. 470, 471.

The Congress, of course, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of Indian tribes. *United States* v. *Wheeler, supra.* This power was articulated in *United States* v. *Mazurie*, 419 U.S. 544 (1975):

> This court has recognized limits on the authority of Congress to delegate its legislative power. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935). Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322 (1936). Thus it is an

important aspect of this case that Indian Tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester* v. *Georgia*, 6 Pet. 515, 557 (1832); they are "a separate people" possessing "the power of regulating their internal and social relations. . .," *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973).

. . . [*W*]*hen Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter.* [Emphasis supplied.]

419 U.S. at pp. 556, 557.

The Supreme Court has recognized that Indian Tribes have separate, distinct rights of self-determination constituting them "quasi-sovereign tribal entities." *United States* v. *Wheeler*, *supra*; *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). These rights flow from the historical recognition of tribal political independence in the context of tribal-federal relations first declared in *Worcester* v. *Georgia*, *supra*, which involved the applicability of certain statutes enacted by the State of Georgia relative to reservation lands of the Cherokee Tribe. The Court held that the State statutes were not enforceable. While recognizing that Indian tribes are independent political communities possessing attributes of sovereignty over both their members and their territory, the Court nevertheless placed particular significance on the fact that the Constitution vested full control of Indian affairs in the Federal Government. In my view, the exclusivity of "control" indicated in *Worcester*, *supra*, was modified, at least interpretive-wise, by subsequent

Supreme Court decisions which recognized the power of the states in specific areas over Indians and reservation lands providing that the power exercised does not infringe on the tribal powers of self-government which are part of the doctrine of tribal sovereignty, and, thus, those "inherent powers of a limited sovereignty" referred to in *United States* v. *Wheeler, supra.*

Applying the foregoing test, I conclude that it is incumbent upon the courts, on a case-to-case basis, to carefully scrutinize the power to be exercised in terms of the intended purpose and the interest to be served. Neither treaties or statutes dealing with Indian affairs relate or "speak" to many of the "jurisdictional" conflicts which have surfaced.

If statutes and treaties provide clear guidance relative to Congressional intent, no further inquiry is required. Thus, in the very area of our inquiry here (the power of the Indian Tribes to tax non-members on the Reservation lands) there are decisions upholding tribal tax assessments authorized by treaties, statutes or agreements with the United States. In *Morris* v. *Hitchcock*, 194 U.S. 384 (1904), the Supreme Court upheld an act of the Chickasaw Nation imposing an annual per head privilege or permit tax on cattle and other animals owned by a non-Indian who was grazing animals under a lease on the Reservation lands. The Court specifically found the tax assessment to be authorized under both the terms of treaties entered into with the Five Civilized Tribes, and the Curtis Act. In *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), the Court upheld a "permit tax" imposed by the Creek Indian Nation in the nature of a percentile levy on all goods offered for sale by non-member traders doing business on the Reservation lands. The Court relied upon *Morris* v. *Hitchcock, supra*, and *Crabtree* v. *Madden*, 54 F. 426 (8th Cir. 1893) in upholding the tax, i.e., the existence of the power and authority granted the

Tribe under treaties and acts. Even so, the court did opine that in the absence of an Act of Congress, treaty or agreement with the United States, the Creek Nation would be empowered to impose the tax as ". . . one of the inherent and essential attributes of its original sovereignty." In *Crabtree* v. *Madden, supra*, the Court upheld an annual license tax of $200.00 assessed by the Creek Nation against non-member traders doing business on the Reservation based upon the power and authority reserved to the Tribe under the Treaty of August 7, 1856, 11 Stat., p. 703, Art. 15, which granted the Creeks the unrestricted right of self-government with full jurisdiction over persons and property within their limits. The Treaty provided that all persons not members of the Tribe were to be regarded as "intruders" subject to removal unless traveling through or "trading therein under license."

If, then, there are no treaties, statutes and agreements granting such power, the courts have been compelled to engage in the "balancing of interests" process. In this circumstance, the Supreme Court has recognized that non-Indians and their property interests within Indian reservations are subject to licensing enactments or ordinances. *United States* v. *Mazurie, supra*, involved the inherent power of the Tribe to grant or deny a liquor license to a non-Indian liquor dealer operating a retail business on non-Indian lands within the boundaries of the reservation. In like manner, tribal hunting and fishing licenses governing non-members who enter the reservations to hunt and fish have been grounded upon the inherent powers of the Tribe. *Quechan Tribe of Indians* v. *Rowe*, 531 F.2d 408 (9th Cir. 1976).

There are other areas where courts have been compelled to engage in the balancing of interest process. Thus, in *Puyallup Tribe, Inc.* v. *Washington Game Department*, 433 U.S. 165 (1977), the State of Washing-

ton's conservation regulations dealing with an allocation of the total number of steelhead fish which could be netted by the Indians on the waters flowing through reservation lands was upheld as a proper conservation measure and not as an attempt to allocate the number of fish which could be netted by the tribe. To the same effect is *Organized Village of Kake* v. *Egan, supra.* The Court there upheld the State of Alaska's prohibition against the Thlinget. Indians' use of salmon traps on waters flowing through the incorporated communities, notwithstanding Alaska's disclaimer in its Alaska Statehood Act relating to Indians, to-wit: (a) disclaimer of right and title to Indian property, and (b) recognition that the United States retains "absolute jurisdiction and control" over right and title of Indian property. *Enriquez* v. *Superior Court,* 565 P.2d 522 (Ariz. Ct. App. 1977) held that a tribal court had jurisdiction in tort cases involving actions brought by a non-member against a tribal member resulting from an accident occurring on the reservation.

The Supreme Court has dealt with the "balancing of interests" problem in very few decisions. In *Oliphant* v. *Suquamish Indian Tribe, supra,* the Court held that Indian tribes lack criminal jurisdiction over non-members in the absence of specific Congressional authorization. The Court observed, *inter alia*:

> Indian reservations are "a part of the territory of the United States." *United States* v. *Rogers,* 4 How. 567, 571 (1846). Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority. ." *Id.,* at 572. Upon incorporation into the territory of the United States, the Indian tribes thereby came under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding

> sovereignty. "[T]heir rights to complete sovereignty, as independent nations [are] necessarily diminished." *Johnson* v. *M'Intosh*, 8 Wheat. 543, 574 (1823).
>
> 435 U.S. at pp. 208, 209.

The Supreme Court, in *Organized Village of Kake* v. *Egan*, *supra*, following a review of a number of its prior decisions in this area of concern, observed:

> These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law.
>
> 369 U.S. at p. 75.

The problems generated by the issue of the "exclusiveness" of federal jurisdiction were highlighted by this language contained in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973):

> . . . The upshot [of more individuality in treatment of certain treaties and specific federal statutes, including statehood enabling legislation as they, taken together, affect the respective rights of states, Indians and the Federal Government] has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. *Organized Village of Kake*, *supra* at 75; *Williams* v. *Lee*, 358 U.S. 217 (1959); *New York, ex. rel. Ray* v. *Martin*, 326 U.S. 496, 499 (1946); *Draper* v. *United States*, 164 U.S. 240 (1896).
>
> 411 U.S. at p. 148.

See also: United States v. *Mazurie*, *supra*.

I would hold that the District Court did not err in finding that the Tribe's sovereign status does not extend to or allow the imposition of the challenged Tribal Severance Tax. In my view, the power of the Tribe to impose such a tax in these consolidated cases is clearly a political question which has not been explicitly addressed by the Congress. If the Congress intends that such power exists, it is incumbent that legislation be enacted explicitly so declaring. Until or unless the Congress affirmatively acts, I would hold that Tribe does not possess the right, power and authority to enforce the collection of its Tribal Severance Tax. My research discloses only two opinions which recognize the *inherent power* of an Indian tribe to enact and enforce a tribal ordinance assessing a tax upon a non-Indian's income from business conducted within reservation boundaries. *Barta* v. *Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958) *cert. denied*, 358 U.S. 932 (1959); *Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956). I decline to adopt the broad interpretation of inherent tribal sovereignty—power laid down in these opinions, and adopted by the majority here.

A significant aspect of the issue before us here involves recognition that the United States Government, as guardian, has enacted much legislation and appropriated significant amounts of federal funds for the direct, specific and exclusive benefit of its Indian wards. In like manner, the various states wherein the tribes reside have rendered state governmental aid and assistance in many important areas, utmost of which is perhaps the maintenance of the public schools. To what extent the Congress intends its beneficial enactments and appropriations to serve as exclusive means, I do not know. It is, however, my view that this involves a legislative judgment in the nature of a political question. The question of what involves "essential tribal relations" referred to in *Williams* v. *Lee*, *supra*, is, in my judgment a political question.

In positing the "inherent sovereignty" issues presented here as a political question for Congressional determination, we recognize that the United States Government, out of avowed solicitude for the welfare of its Indian wards who were considered ". . . a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith," *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912), undertook by treaties, statutes and executive orders to establish legal relations between the United States Government and the Indian Tribes which ". . . resembles that of a ward to his guardian." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Implicit in the relationship thus created, in terms of "ownership" of the property set aside for the use, occupancy and benefit of the Indian tribes, is the fact that legal title, with its attendant aspect of dominion and ultimate control, vests in the United States, as guardian, with the right of use, benefit and occupancy vesting in the Indian wards. That relationship between the United States Government and the various Indian tribes, however, was never intended to be one of Indian servitude. Thus, the Supreme Court has held that the power of Congress over Indian affairs, though plenary in nature, is not absolute and that the standard of review recently applied is that legislative judgments should not be disturbed "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 85 (1977); *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974).

The "Indian Sovereignty" doctrine cannot be equated with the governmental sovereignty of the United States Government. It is, however, of a "unique and limited character" existing at the sufferance of Congress and subject to complete defeasance. *United States* v. *Wheeler*, *supra*, at p. 323. Tribal self government is rooted in the current federal policy of promoting tribal self-govern-

ment, *Bryan* v. *Itasca County, Minnesota, supra,* which advances the social, institutional, political and cultural values peculiar to the respective tribes. The basic right of Indian internal self-government is directed to their right "of regulating their internal and social relations," out of recognition of their "semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people." *United States* v. *Kagama,* 118 U.S. 375, 381 (1886).

II.

In the context of the above analysis of the current federal policy, I now consider the status of Congressional judgment in the area of the challenged Tribal Severance Tax in weighing the preemption contention against the claim of inherent tribal sovereignty. If the Congress has explicitly addressed the subject matter, obviously there is no need for this Court to engage in the "balancing of interests" determination.

In my view, just as found by the District Court, there is clear congressional intent controlling in this case. I would hold that the enactment by the Congress on March 3, 1927, of 25 U.S.C.A. § 398c., 44 Stat. 1347, constituted clear, unambiguous legislative intent that only a "state or local authority" is empowered to levy and collect taxes upon the production from oil and gas wells produced and saved "*upon lands within Executive order Indian reservations.*" That statute imposes one restriction only, i.e., that such taxes may not become a lien against Indian lands or property. The statute reads in full as follows:

> § 398c. Same; taxes
>
> Taxes may be levied and collected by the State or local authority upon improvements, output of

> mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury. *Provided*, that such taxes shall not become a lien or charge of any kind against the land or other property of such Indians. Mar. 3, 1927, c. 299, § 3, 44 Stat. 1347.

Tribe and the Secretary of the Interior contend that 25 U.S.C.'s § 398c. does not pertain or control. They argue, first, that Tribe, as an element of its sovereign status, is empowered to enact and enforce its severance tax ordinance and, second, that the Congressional enactment on May 11, 1938, of 25 U.S.C.A. § 396a. specifically governs the subject leases (and production therefrom) and does not permit state taxation of oil and gas produced within the Tribe's reservation. That statute reads as follows:

> § 396a. Leases of unallotted lands for mining purposes; duration of leases
>
> On and after May 11, 1938 unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of this section by section 396f of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities. May 11, 1938, c. 198 § 1, 52 Stat. 347.

I cannot accept the contentions of Tribe and the Secretary, with full recognition of the rule that limitations on tribal self-government cannot be implied from a statute or treaty but must be *expressly* stated or otherwise made clear from surrounding circumstances and legislative history. *Bryan* v. *Itasca County, Minnesota, supra; Morton* v. *Mancari, supra.* My review of the legislative history of 25 U.S.C.A. 398(c) convinces me that the Congress did intend to grant States and local authorities the *exclusive* authority to tax non-Indian oil and gas lessees on production realized from their oil and gas operations conducted on Executive order Indian reservation lands. It has been held that Indian tribes are not "states". *Native American Church* v. *Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959); *Barta* v. *Oglala Sioux Tribe, supra.* The Congressional discussions and debates relating to this legislation concentrated on the fact that Executive order reservation lands were not in the same category as those lands set aside under treaty to a tribe which "gave up" or "surrendered" ancestral or aboriginal rights in exchange therefor, but were, instead, simply set aside as a "gratuity" to the tribes from the United States. In the sense of the "balancing of interests" process, the Congress compromised the competing interests of the States and the tribes by authorizing the tribes to retain all of the royalties paid under the operating leases and the States to impose taxes on the production of oil and gas. (H. Rept. No. 1791, 69th Cong., 2nd Sess., 69 Cong. Rec. 4580 (1927)). *See also*: (S.B. 876, 68th Cong., 2nd Sess., 66 Cong. Rec. 999 (1924); 66 Cong. Rec. 2234 (1925); 67 Cong. Rec. 10915 (1926).

I would reject Appellants' argument that the 1938 enactment of the Indian Mineral Leasing Act, 25 U.S.C.A. § 396(a), *et seq.*, repeals 25 U.S.C.A. 398(c). Although cognizant that statutes enacted for the benefit of the dependent Indian tribes are to be liberally construed and

that doubtful expressions are to be resolved in favor of the Indians, *Morton* v. *Mancari, supra,* I would hold that because nothing in the Mineral Leasing Act of 1938 speaks to the subject of taxation of oil and gas produced from Indian lands and certainly nothing relating to Executive order reservation lands, there is lacking that required "clear intention" of provisions contained in a general statute necessary to effect repeal of or nullify the express terms of a specific statute, (25 U.S.C.A., 398c.), regardless of the priority of enactment. *Morton* v. *Mancari, supra; Colorado River Water Cons. Dist.* v. *United States,* 424 U.S. 800 (1976); *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973); *Jicarilla Apache Tribe* v. *United States, supra; Glover Construction Company* v. *Andrus,* 591 F.2d 554 (10th Cir. 1979); Sutherland, Statutory Construction, 4th Ed., Vol. 2A, § 51.05. Statutes must be construed as intended by the drafters when enacted in the light of conditions as they existed. *United States* v. *Stewart,* 311 U.S. 60 (1940).

In addition to reliance on repeal by implication of 25 U.S.C.A. § 398c. by enactment of 25 U.S.C.A. § 396(a), *et seq.,* Tribe further relies on the authority of the Indian Reorganization Act of June 18, 1934, 25 U.S.C.A. §§ 476-477.

In accordance with the Indian Reorganization Act, Tribe adopted a revised Constitution on December 23, 1968, subsequently approved by the Undersecretary of the Interior. The revised Constitution organized the tribal government into the tripartite departments of legislative, executive and judicial. The principal governing body is the tribal council consisting of elected members of the Tribe. Pertinent portions of the Tribe's revised Constitution are:

> Article XI, Section 1 provides:
>
> The *inherent powers* of the Jicarilla Apache Tribe, *including* those conferred by Section 16 of the Act

> of June 18, 1934, (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of the Department of the Interior, and the restrictions established by this revised constitution. [Emphasis supplied.]

Subparagraph (e) of Section 1, Article 10, provides:

> (e) Taxes and fees. The tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation.

Section 2 of Article 10 establishes the procedures for approval of tribal ordinances, which, in substance, provides that ordinances enacted be presented to the Superintendent, Bureau of Indian Affairs, Jicarilla Apache Agency, within ten days after approval by the Council, and that the Superintendent shall within ten days following receipt by him, transmit it to the Secretary of the Interior with his recommendation. The enactment becomes effective when approved by the Secretary, or if he does not act within 120 days following submittal to him. It was under authority thereof that the tribal council of Tribe on July 9, 1976, enacted its Oil and Gas Severance Tax Ordinance and further enacted a Severance Tax Permanent Fund Ordinance. These ordinances were subsequently approved by the Secretary of the Interior's delegate. The Tribal Severance Tax is expressly imposed on "any oil and natural gas severed, saved and removed from Tribal lands." The *measure* of the tax is 5 cents per million BTU of gas and 29 cents per barrel of crude oil or condensate produced on the Reservation and "*sold or transported off the reser-*

vation." All oil, gas or condensate representing [reserved] royalty gas "taken by the Tribe in kind and used by the Tribe," *is exempt from the Tax.*

Tribe does not—and cannot—point to any specific language in the Indian Reorganization Act of 1934 authorizing or empowering it to tax. In lieu of any such specific, clear language, Tribe relies upon (a) the stated purpose of the Act, i.e., freedom to organize for purposes of self-government and economic enterprise, and (b) an opinion rendered by the Solicitor to the Secretary of the Interior in 1934, identified as 55 I.D. 14, setting forth the purported intentions of Congress in enacting Section 16 of the Act. The opinion reads in part as follows:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.
>
> * * *
>
> I conclude that under Section 16 of the Wheeler-Howard Act (Public No. 383, 73rd Congress) the "powers vested in any Indian tribe or tribal council by existing law," are those powers of local self-government which have never been terminated by law or waived by treaty, and that chief among these powers are the following:
>
> * * *
>
> 5. To levy dues, fees, or taxes upon the members of the tribe and upon non-members residing or doing any business of any sort within the reservation, so far as may be consistent with the power of the Commissioner of Indian Affairs over licensed traders.

Tribe contends that the Solicitor's opinion, rendered the same year the Act became effective, is the "best indication of Congressional intent available," citing to *Squire* v. *Capoeman*, 351 U.S. 1 (1956). [Brief of Tribe, In Chief, p. 24.] A careful examination of the exact language employed by the court in *Squire* v. *Capoeman*, *supra*, is simply that "These relatively contemporaneous official and unofficial writings are entitled to consideration." 351 U.S. at p. 9. I have considered them and find them wanting.

The only express language contained in the 1934 Act vesting rights and powers in a tribe or its tribal council, if organized under the terms of the Act is: *To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments.* 25 U.S.C.A. § 476. The only conceivable language expressed in the § 476, *supra*, which the Solicitor's Opinion 55 I.D. 14 could have relied upon to "make the case" is that authorizing the various Indian tribes to organize under the Act "for its common welfare" and to adopt "an appropriate constitution and bylaws." Any reliance thereon, as support of Tribe's contention that the Act effectively repealed 25 U.S.C. § 298c., *supra*, is misplaced.

My interpretation of the interplay between these conflicting contentions is, I believe, in accord with a detailed analysis of a similar conflict set forth in *Fort Mojave Tribe* v. *San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1976). In that case, California exercised civil and criminal jurisdiction over Indian country within its borders [but specifically exempted taxation of any real or personal property belonging to any Indian or Indian tribe] author-

ized under 28 U.S.C. § 1360(b). The court pertinently observed:

> While the imposition of a possessory interest tax on the leasehold interest will have an economic effect on the Indian lessors, and perhaps, although not certainly, will reduce the amount of rent they will be able to collect the legal incidence of the tax clearly falls on the lessee.[3] The lessor will never be personally liable for any delinquent taxes arising under this taxing statute. . . Under these circumstances, there cannot be a direct encumbrance on the lessor's reversionary interest. Similarly, the lease, apart from the lessor's reversionary interest, even if considered an asset of the tribe, is not directly encumbered simply because the amount of the tax is determined by the value of the leasehold. Whatever may be the scope of the indirect burden placed on the lessor's interest in this case, we hold that it is not sufficient to constitute an encumberance of an "interest in land or other tribal asset."

Our conclusion is buttressed by the Supreme Court's decision in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973). There the Court, relying on the statement that section 476 of the Act [The Indian Reorganization Act of 1934] was designed to encourage tribal enterprises "to enter the white world on a footing of equal competition," 78 Cong. Rec. 11732, found that traditional tax immunities had neither been expanded nor reduced by the Act. *Mescalero, supra* at 153-54 n.9, 93 S. Ct. 1267. Because the court would not imply tax exemptions absent clear statutory guidelines it upheld the imposition of a state tax on the gross receipts of a ski resort operated by the Mescaleros on land located outside the boundaries of their reservation. *We follow that lead here and re-*

fuse to find that the Act created a tax exemption for non-Indian lessees of Indian land. Congress has given no clear indication that such a result was desired. When such a signal is given, the state and local governments must retreat.

* *

Thus, we see that neither the Act nor PL-280 evidences a Congressional intent to preclude the taxation that is being challenged here. However, we cannot say that PL-280 directly authorizes such taxation. *Bryan* v. *Itasca County, supra,* forecloses the possibility of such a statement by specifically holding that the PL-280 grant of civil jurisdiction only confers jurisdiction over civil causes of action involving Indians. It is not a general grant of regulatory and taxing power over Indians. This is not, however, fatal to the state's cause. Although *McClanahan, supra,* held that, in the absence of Congressional consent, states are preempted from taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, the court specifically did not deal with "exertions of state sovereignty over non-Indians who undertake activity on Indian reservations." *McClanahan, supra* at 411 U.S. 168, 93 S. Ct. at 1260. When the state action is directed at non-Indians, with only indirect effects on Indians or Indian lands, it is necessary to reconcile the federal preemption rationale with the state's recognized authority to regulate its citizens. *McClanahan, supra* at 179, 93 S. Ct. 1257. Reconciliation requires that state legislation primarily directed at non-Indian lessees of Indian land be considered as not automatically preempted by the federal government in the absence of specific authorization. . . *To permit such non-Indians to enjoy the immunity designed for Indians requires,*

we believe, a stronger Congressional signal than a statute which neither precludes nor authorizes the taxation in question. [Footnote omitted.] [Emphasis supplied.]

543 F.2d at pp. 1256, 1257.

I observe that in the case at bar a holding that the New Mexico State taxes levied against the proceeds of oil and gas produced by lessee Operators from Tribe's Reservation lands are valid based upon the express Congressional "signal" authorizing same, i.e., 25 U.S.C. § 398 (c), avoids any risk of permitting its imposition absent such clear Congressional consent. The Congress has expressly provided that the taxing laws of the various states extend over and apply to proceeds realized by non-Indian Operators from mineral exploration conducted on Executive Order Reservation lands. It is this power the court recognized in *Warren Trading Post Co.* v. *Arizona State Tax Commission*, 380 U.S. 685 (1965).

In its Reply Brief and Additional Brief filed prior to oral argument, Tribe relies upon the Natural Gas Act of 1978, 15 U.S.C. §§ 3301, *et seq.*, as express Congressional recognition of tribal authority to impose severance taxes on natural gas. 15 U.S.C. § 3320(c) defines, for purposes of the Act, "State Severance Tax" as any "Severance production, or similar tax . . . imposed on the production of natural gas. . . by any State or Indian Tribe." Tribe acknowledges that the conference report statement clearly shows that the Congressional conferees did not intend thereby to prejudge the outcome of cases then on appeal to this Court respecting the power of Indian tribes to impose taxes on non-Indians engaged in business activities on Indian reservations. In any event, I would hold that nothing in the language of the Natural Gas Act of 1978 can be interpreted as a Congressional grant of power to Indian tribes to enact and levy tribal severance taxes. The language is not, either expressly or impliedly,

an affirmative grant of such power of taxation to Indian tribes.

III.

I would hold that the District Court did not err in concluding that the Tribe's Severance Tax levied only against oil, gas or condensate produced on the Reservation and sold or transported off the Reservation is an unlawful multiple burden on and discriminatory against interstate commerce.

Tribe and Secretary contend that the severance tax ordinance is not in conflict with the commerce clause because the precise "triggering" event here is entirely "local" in nature, i.e., the tax is imposed on oil and gas when severed, saved and removed from tribal lands. From thence, it is contended that the eventual entry of oil and gas taxed locally upon severance from tribal property into interstate commerce outside of New Mexico does not thereby invalidate the tax. Thus, Tribe and Secretary, in effect, contend that the Tribe's tax is "insulated" by reason of the local nature of its application.

The record reflects that all of the gas provided by Appellee Marathon from Tribe reservation lands is sold in interstate commerce. [R., Vol. VI, p. 240.] Some sixty percent of the production realized by Appellee Amoco is sold in interstate commerce. [R., Vol. VI, p. 229.] Thus, inasmuch as the tax is not designed to apply until the oil and gas produced is "sold or transported off the reservation," I would hold that the incidence bears directly and discriminately against interstate commerce. *Northwestern States Portland Cement Co.* v. *State of Minnesota*, 358 U.S. 450 (1959); *Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167 (1939); *J. D. Adams Manufacturing Co.* v. *Storen*, 304 U.S. 307 (1938). A tax imposed on local activity related to interstate commerce is valid only if the local activity is not such an integral part of interstate process, the flow of commerce, that it cannot realistically be separated from it. *Michigan-Wisconsin*

Pipe Line Co. v. *Calvert*, 347 U.S. 157 (1954). There a Texas tax on the occupation of "gathering gas," measured by the entire volume of gas "taken," as applied to an interstate natural gas pipeline company, where the taxable incidence is the taking of gas from the outlet of an independent gasoline plant within the State for the purpose of immediate interstate transmission, was held invalid under the Commerce Clause. The Commerce Clause is offended when, as here, the tax, by its very nature, makes interstate commerce bear more than its fair share. *Central Greyhound Lines* v. *Mealey*, 334 U.S. 653 (1948).

The Supreme Court has consistently struck down state laws which discriminately benefit [or may discriminately benefit] local or intrastate commerce at the expense of out-of-state or interstate commerce. In *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978) the Court held that the Commerce Clause protects the interstate market, and not particular firms from prohibitive regulations. Under this rationale, the Court observed that a state law does not discriminate against interstate commerce if it leaves the in-state and out-of-state businesses participating in the market on an equal competitive footing. In relation to the instant case, those businesses engaged in exclusive *intrastate* refining, marketing and distribution of oil and gas who purchase that portion of the oil and gas retained on the Tribe's land and thus not subject to the Tribal Severance Tax, would enjoy a discriminatory competitive advantage over those businesses supplying the oil and gas produced from the Reservation lands moving in *interstate* commerce. The in-state businesses would not be assessed the Tribe's Severance Tax, while the out-of-state businesses would. The impact would thus be an unequal competitive footing.

In *Boston Stock Exchange* v. *State Tax Comm'n.*, 429 U.S. 318 (1977), the Supreme Court stated:

> On various occasions when called upon to make the delicate adjustment between the national interest

in free and open trade and the legitimate interest of the individual States in exercising their taxing powers, the Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case. *E.g.*, *Freeman* v. *Hewit, supra,* at 252. This case-by-case approach has left "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 457 (1959). Nevertheless, as observed by Mr. Justice Clark in the case just cited: "[F]rom the quagmire there emerge . . . some firm peaks of decision which remain unquestioned." *Id.*, at 458. Among these is the fundamental principle that we find dispositive of the case now before us: No State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Ibid.* See also *Halliburton Oil Well Co.* v. *Reily,* 373 U.S. 64 (1963); *Nippert* v. *Richmond,* 327 U.S. 416 (1946); *I. M. Darnell & Son* v. *Memphis,* 208 U.S. 113 (1908); *Guy* v. *Baltimore,* 100 U.S. 434, 443 (1880); *Welton* v. *Missouri,* 91 U.S. 275 (1876). The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects. *Dean Milk Co.* v. *Madison,* 340 U.S. 349, 356 (1951).

429 U.S. at p. 329.

I would affirm the District Court.

APPENDIX B

MARCH TERM—April 25, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Circuit Judges*

No. 78-1154

J. GREGORY MERRION and ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, JEROME T. MCHUGH, CHASE OIL COMPANY, DUGAN PRODUCTION CORPORATION, CONSOLIDATED OIL AND GAS, INC., SOUTHLAND ROYALTY COMPANY, TESORO PETROLEUM CORPORATION, AMERADA HESS, SUPRON ENERGY CORPORATION, ENERGY RESERVES GROUP, INC., J. M. HUBER CORPORATION, CONTINENTAL OIL COMPANY, ATLANTIC RICHFIELD COMPANY, PHILLIPS PETROLEUM COMPANY, TENNECO OIL COMPANY, GETTY OIL COMPANY and GULF OIL CORPORATION,

Plaintiffs-Appellees,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL and CECIL ANDRUS, Secretary of the Interior,

Defendants-Appellants,

MOBIL OIL CORPORATION and OXY PETROLEUM, INC.,

Intervenors-Appellees.

No. 78-1251

AMOCO PRODUCTION COMPANY and
MARATHON OIL COMPANY,
Plaintiffs-Appellees,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, Treasurer of the Jicarilla Apache Tribe, CECIL ANDRUS, Secretary of the Interior,
Defendants-Appellants.

This matter comes on for consideration of the petition for rehearing filed by the appellees in the captioned cases.

Upon consideration whereof, it is ordered:

1. Page 6 of the opinion filed February 22, 1980, is recalled and vacated, and a substitute page 6 is published and inserted in its place.

2. The petition for rehearing is denied. Chief Judge Seth and Circuit Judge Barrett voted to grant rehearing. Circuit Judge Seymour, who was not a member of the Court at the time of submission, did not participate.

3. Jicarilla Apache Tribe is granted leave to file its verified bill of costs out of time. The Court has considered the objection to the bill of costs filed by appellees. The Clerk shall issue a statement of costs in favor of appellant Jicarilla Apache Tribe in the sum of $993.51.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 77-292 Civil

CONSOLIDATED CASES

No. 77-343 Civil

J. GREGORY MERRION and ROBERT L. BAYLESS, *et al.*,
Plaintiffs,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL and CECIL ANDRUS, Secretary of the Interior,
Defendants,

and

MOBIL OIL CORPORATION and OXY PETROLEUM, INC.,
Intervenors.

and

AMOCO PRODUCTION COMPANY, a corporation, and MARATHON OIL COMPANY, a corporation,
Plaintiffs,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, Treasurer of the Jicarilla Apache Tribe, CECIL ANDRUS, Secretary of the Interior, TONY MARTINEZ, Executive Director, New Mexico Oil and Gas Accounting Commission,
Defendants.

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following shall constitute the Findings of Fact and Conclusions of Law of the Court:

FINDINGS OF FACT

1. J. Gregory Merrion and Robert L. Bayless, d/b/a Merrion and Bayless, are residents of the State of New Mexico.

2. Jerome T. McHugh is a resident of the State of New Mexico.

3. Chase Oil Company is a New Mexico Corporation with its principal place of business in New Mexico.

4. Dugan Production Corporation is a New Mexico Corporation with its principal place of business in New Mexico.

5. Consolidated Oil and Gas, Inc., is a Colorado corporation with its principal place of business in Colorado.

6. Southland Royalty Company, formerly Aztec Oil and Gas, is a Delaware Corporation with its principal place of business in the State of Texas.

7. Tesoro Petroleum Corporation is a Delaware Corporation with its principal place of business in the State of Texas.

8. Amerada Hess is a Delaware Corporation with its principal place of business in the State of New York.

9. Supron Energy Corporation, formerly Southern Union Production Company, is a Delaware Corporation with its principal place of business in the State of Texas.

10. Energy Reserves Group, Inc., is a Delaware Corporation with its principal place of business in Kansas.

11. J. M. Huber Corporation is a New Jersey Corporation with its principal place of business in the State of New Jersey.

12. Continental Oil Company is a Delaware Corporation with its principal place of business located in the State of Connecticut.

13. Atlantic Richfield Company is a Pennsylvania Corporation located within the State of California.

14. Phillips Petroleum Company is a Delaware Corporation with its principal place of business located in the State of Oklahoma.

15. Tenneco Oil Company is a Delaware Corporation with its principal place of business located within the State of Texas.

16. Getty Oil Company is a Delaware Corporation with its principal place of business located in California.

17. Gulf Oil Corporation is a Pennsylvania Corporation with its principal place of business located in the State of Pennsylvania.

18. Mobil Oil Corporation is a Delaware Corporation with its principal place of business in the State of New York.

19. Oxy Petroleum, Inc., is a California Corporation, with its principal place of business in the State of California.

20. Amoco is a Delaware corporation with its principal place of business in Illinois.

21. Marathon is an Ohio corporation with its principal place of business in Ohio.

22. The Jicarilla Apache Tribe is an Indian Tribe organized pursuant to 25 U.S.C. §§ 476-477, residing on an Executive Order Indian Reservation within the bound-

aries of the State of New Mexico. The Jicarilla Apache Tribal Council exercises the legislative powers of the Jicarilla Apache Tribe. Gwendolyn Velarde is the Treasurer of the Jicarilla Apache Tribe and is responsible for the enforcement and collection of the Jicarilla Oil and Gas Severance Tax. Cecil Andrus is Secretary of the Interior.

23. The plaintiffs hold leases, granted by the Secretary of the Interior with the consent of the Tribe, for the recovery of oil and gas on the Jicarilla Apache Indian Reservation. Plaintiffs are at present producing oil and gas products on the reservation and paying royalties to the Tribe. Approximately 80% of the products are shipped interstate for sale outside the State of New Mexico.

24. The State of New Mexico imposes and collects from the plaintiffs the following taxes measured by the production on the Jicarilla Apache Reservation:

Oil and gas emergency school tax;

Oil and gas conservation tax;

Oil and gas production equipment ad valorem tax; and

Oil and gas severance tax.

25. The Jicarilla Apache Tribe on November 22, 1968, adopted a revised constitution which included a provision authorizing the Tribal Council to enact ordinances providing for the levy and collection of taxes and fees on nonmembers of the Tribe doing business on the reservation. The revised constitution, as amended, was approved by the acting Undersecretary of the Interior on or about February 13, 1969.

26. On or about July 9, 1976, the Jicarilla Apache Tribal Council adopted the Jicarilla Oil and Gas Sever-

ance Tax in No. 77-0-02 and thereafter such ordinance was amended by Tribal Council Ordinance No. 77-0-195 and resolution 77-327.

27. That in enacting 25 U.S.C. § 398(c) Congress intended to allow the states and local authorities the exclusive right to tax oil and gas production from executive order Indian reservations.

28. That in enacting 25 U.S.C. § 398(c) Congress did not intend to include Indian tribes within the meaning of "state or local authority."

29. The Jicarilla Oil and Gas Severance Tax by its terms and the instructions for its implementation applies only to oil and gas produced on the Jicarilla Apache Reservation and not to similarly situated oil and gas produced in the same geological region of northwest New Mexico.

30. The Jicarilla Oil and Gas Severance Tax expressly provides for an exemption from taxation for "royalty gas, oil or condensate taken by the Tribe in kind, and used by the tribe."

31. The Jicarilla Apache Tribal Oil and Gas Severance Tax as well as the written instructions directed to plaintiffs with regard to the payment of the tax, expressly provides that the tax need only be paid on gas, crude oil or condensate produced on the Jicarilla Apache Reservation "and sold or transported off the Reservation."

32. The Jicarilla Oil and Gas Severance Tax would, if valid, amount to over two million dollars annually.

33. That the plaintiffs would have the right under their contractual provisions to pass the majority of the burden of the Jicarilla Gas Severance Tax, if valid, on to their customers.

34. That if the plaintiffs are required to absorb the Jicarilla Oil Severance Tax such tax will substantially limit the ability of some of the plaintiffs to profitably operate some of the existing oil wells on the Jicarilla Apache Reservation.

35. If the wells operated by plaintiffs cannot be operated profitably the plaintiffs would be required to shut down such wells resulting in a loss of natural resources and an unjust return of the wells to the Jicarilla Apache Tribe.

36. That if the Jicarilla Apache Oil and Gas Severance Tax were valid the combined tax burden amounts to more than 29% of the interstate price of old gas and over 12.5% of the price of old oil.

37. That unless the Jicarilla Apache Tribal Severance Tax contained in Tribal Council Ordinance No. 77-0-02, as amended by Tribal Ordinance No. 77-0-195 and resolution 77-327, is declared invalid and the defendants restrained from taking action they will move to enforce such Ordinances and resolutions and collect the Jicarilla Apache Tribal Oil and Gas Severance Tax.

38. The Jicarilla Apache Tribal Severance Tax become effective April 1, 1977. Under the terms of the ordinance, plaintiffs would be subject to the severance tax by virtue of their production of natural gas and condensate on the Jicarilla Apache Reservation. Enforcement of the tax has been stayed pending a resolution of the legality of the tax.

39. That plaintiffs sell the gas and oil produced from the Jicarilla Apache Reservation in both interstate and intrastate commerce.

40. Prior to their incorporation under the Indian Reorganization Act in 1937 the Jicarilla Apache Tribe had never attempted to exercise a power of taxation over non-Indians.

41. That in adopting the Indian Reorganization Act 25 U.S.C. §§ 464 *et seq.* Congress intended Indian tribes accepting a charter thereunder to have only those powers specifically enumerated in the Act together with such powers as were "vested in any Indian tribe or tribal council by existing law." The power to tax non-Indians is not one of the enumerated powers given to Indian Tribes incorporated under 25 U.S.C. § 464 and was not vested in the Jicarilla Apache Tribe by existing law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties to this action.

2. That venue is proper in the United States District Court for the District of New Mexico.

3. That by enacting 25 U.S.C. § 398(c) Congress granted the state and local authorities the exclusive right to impose a severance tax upon oil and gas produced from executive order Indian reservations.

4. That the Jicarilla Apache Tribe is not a "state or local authority" within the meaning of 25 U.S.C. § 398 (c).

5. The Jicarilla Apache Tribe Oil and Gas Severance Tax constitutes an unlawful multiple burden on interstate commerce.

6. The Jicarilla Apache Tribe Oil and Gas Severance Tax is levied only against natural gas, crude oil or condensate which is produced on the reservation and sold or transported off the reservation and therefore discriminates against interstate commerce.

7. Whatever sovereignty the Jicarilla Apache Tribe possesses does not extend to or allow the imposition of a severance tax upon oil and gas produced on the Jicarilla Reservation.

8. That, as of the effective date of 25 U.S.C. §§ 464, *et seq.*, the power to tax non-Indians was not vested in the Jicarilla Apache Tribe or its Tribal Council, and not being one of the powers enumerated in the Act, the Secretary of the Interior's approval of the Tribal Constitution cannot operate to vest such power in the Tribe.

9. An actual justiciable controversy exists between the plaintiffs and defendants under the meaning of the Declaratory Judgment Act, 25 U.S.C. 2201 *et seq.* and pursuant to that act this Court declares the Jicarilla Oil and Gas Severance Tax to be illegal, unconstitutional, invalid and void and in conjunction with this Declaratory Judgment issues a permanent injunction restraining defendants from taking any action to collect the Jicarilla Apache Oil and Gas Severance Tax.

Any requested Findings of Fact and Conclusions of Law not included herein are hereby denied.

/s/ H. Vearle Payne
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 77-292 Civil

CONSOLIDATED CASES

No. 77-343 Civil

J. GREGORY MERRION and ROBERT L. BAYLESS, *et al.*,
Plaintiffs,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL and CECIL ANDRUS, Secretary of the Interior,
Defendants.

and

MOBIL OIL CORPORATION and OXY PETROLEUM, INC.,
Intervenors.

and

AMOCO PRODUCTION COMPANY, a corporation, and MARATHON OIL COMPANY, a corporation,
Plaintiffs,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, Treasurer of the Jicarilla Apache Tribe, CECIL ANDRUS, Secretary of the Interior, TONY MARTINEZ, Executive Director, New Mexico Oil and Gas Accounting Commission,
Defendants.

JUDGMENT

THIS MATTER having been heard by the Court and the Court having studied the briefs submitted by the

parties, heard the testimony, evidence and arguments of counsel and having entered its Findings of Fact and Conclusions of Law and being otherwise fully advised in the premises,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Jicarilla Apache Oil and Gas Severance Tax is illegal, unconstitutional, invalid and void, it is therefore,

ORDERED that a Permanent Injunction is herewith issued and that defendants, their agents, servants, employees and attorneys and all persons in active concert and participation with defendants be, and they hereby are restrained and enjoined from taking any action to enforce or collect the Jicarilla Apache Oil and Gas Severance Tax.

IT IS FURTHER ORDERED that the plaintiffs and intervenors recover their costs to be taxed by the Clerk of the Court.

/s/ H. Vearle Payne
United States District Judge

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-968

AMOCO PRODUCTION COMPANY AND
MARATHON OIL COMPANY
Petitioners,

v.

JICARILLA APACHE TRIBE, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 21, 1980.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 9th
day of May, 1980.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-968

AMOCO PRODUCTION COMPANY AND
MARATHON OIL COMPANY
Petitioners,

v.

JICARILLA APACHE TRIBE, *et al.*

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including July 5, 1980.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 12th
day of June, 1980.

APPENDIX G

United States Constitution, Article I, Section 8, Clause 3:

> The Congress shall have Power . . .
>
> To regulate Commerce . . . among the several States, and with the Indian Tribes; . . .

APPENDIX H

Act of March 3, 1927, 25 U.S.C. § 398a-e (1976):

§ 398a. Leases of unallotted lands for oil and gas mining purposes within Executive order Indian reservations

Unallotted lands within the limits of any reservation or withdrawal created by Executive order for Indian purposes or for the use or occupancy of any Indians or tribe may be leased for oil and gas mining purposes in accordance with the provisions contained in section 398 of this title.

(Mar. 3, 1927, ch. 299, § 1, 44 Stat. 1347.)

§ 398b. Proceeds from rentals, royalties, and bonuses; disposition

The proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive order Indian reservations or withdrawals shall be deposited in the Treasury of the United States to the credit of the tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians: *Provided*, That said Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by Act of Congress.

(Mar. 3, 1927, ch. 299, § 2, 44 Stat. 1347.)

§ 398c. Taxes

Taxes may be levied and collected by the State or local authority upon improvements, output of mines

or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: *Provided,* That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians.

(Mar. 3, 1927, ch. 299, § 3, 44 Stat. 1347.)

§ 398d. Changes in boundaries of Executive order reservations

Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress.

(Mar. 3, 1927, ch. 299, § 4, 44 Stat. 1347; Oct. 21, 1976, Pub. L. 94-579, title VII, § 704(a), 90 Stat. 2792.)

AMENDMENTS

1976—Pub. L. 94-579 struck out the proviso relating to nonapplicability of provisions to temporary withdrawals by the Secretary of the Interior.

EFFECTIVE DATE OF 1976 AMENDMENT

Section 704(a) of Pub. L. 94-579 provided in part that this section is amended effective on and after Oct. 21, 1976.

SAVINGS PROVISIONS

Amendment by Pub. L. 94-579 not to be construed as terminating any valid lease, permit, patent, etc., existing on Oct. 21, 1976, see Savings Provisions note under section 1701 of Title 43, Public Lands.

§ 398e. Applications for permits to prospect for oil and gas filed under other statutes; disposition

The Secretary of the Interior is authorized, under such rules and regulations as he may prescribe, to allow any person who prior to May 27, 1924, filed an application for a permit in accordance with the provisions of the Act of February 25, 1920, to prospect for oil and gas upon lands within an Indian reservation or withdrawal created by Executive order who shall show to the satisfaction of the Secretary of the Interior that he, or the party with whom he has contracted, has done prior to January 1, 1926, any or all of the following things, to wit, expended money or labor in geologically surveying the lands covered by such application, has built a road for the benefit of such lands, or has drilled or contributed toward the drilling of the geologic structure upon which such lands are located, or who in good faith has either filed a motion for reinstatement or rehearing; or performed any other act which in the judgment of the Secretary of the Interior entitles him to equitable relief, to prospect for a period of two years from March 3, 1927, or for such further time as the Secretary of the Interior may deem reasonable or necessary for the full exploration of the land described in his application under the terms and conditions therein set out, and a substantial contribution toward the drilling of the geologic structure thereon by such applicant for a permit thereon may be considered as prospecting under the provisions hereof; and upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil and gas have been discovered within the limits of the land embraced in any such application, he shall be entitled to a lease for one-fourth of the land embraced in the application: *Pro-*

vided, That the applicant shall be granted a lease for as much as one hundred and sixty acres of said lands if there be that number of acres within the application. The area to be selected by the applicant shall be in compact form and, if surveyed, to be described by the legal subdivisions of the public land surveyed; if unsurveyed, to be surveyed by the Government at the expense of the applicant for lease in accordance with rules and regulations to be prescribed by the Secretary of the Interior, and the lands leased shall be conformed to and taken in accordance with the legal subdivisions of such surveys; deposit made to cover expense of surveys shall be deemed appropriated for that purpose, and any excess deposits may be repaid to the person or persons making such deposit or their legal representatives. Such leases shall be for a term of twenty years upon a royalty of 5 per centum in amount or value of the production and the annual payment in advance of a rental of $1 per acre, the rental paid for any one year to be credited against the royalties as they may accrue for that year, with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior. The applicant shall also be entitled to a preference right to a lease for the remainder of the land in his application at a royalty of not less than 12½ per centum in amount or value of the production, the royalty to be determined by competitive bidding or fixed by such other methods as the Secretary of the Interior may by regulations prescribe: *Provided further,* That the Secretary of the Interior shall have the right to reject any or all bids.

(Mar. 3, 1927, ch. 299, § 5, 44 Stat. 1347.)

APPENDIX I

Sections 16 and 17 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. §§ 476, 477 (1976):

§ 476. Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said trible shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Fed-

eral projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress. June 18, 1934, c. 576, § 16, 48 Stat. 987.

§ 477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *provided*, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefore interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress. June 18, 1934, c. 576, § 17, 48 Stat. 988.

APPENDIX J

Sections 1 through 7 of the General Leasing Act of May 11, 1938, as amended, 25 U.S.C. §§ 396a-f (1976):

§ 396a. Leases of unallotted lands for mining purposes; duration of leases

On and after May 11, 1938 unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of this section by section 396f of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities. May 11, 1938, c. 198, § 1, 52 Stat. 347.

Historical Note

Repeals. Section 7 of Act May 11, 1938, provided as follows:

> "All Acts or parts of Acts inconsistent herewith are hereby repealed."

§ 396b. Public auction of oil and gas leases; requirements

Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be

served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: *Provided*, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464-475, 476-478, and 479 of this title. May 11, 1938, c. 198, § 2, 52 Stat. 347.

§ 396c. Lessees of restricted lands to furnish bonds for performance

On and after May 11, 1938 lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds, in amounts satisfactory to the Secretary of the Interior, guaranteeing compliance with the terms of their leases: *Provided*, That personal surety bonds may be accepted where the sureties deposit as collateral with the said Secretary of the Interior any public-debt obligations of the United States guaranteed as to principal and interest by the United States equal to the full amount of such bonds, or other collateral satisfactory to the Secretary of the Interior, or show ownership to unencumbered real estate of a value equal to twice the amount of the bonds. May 11, 1938, c. 198, § 3, 52 Stat. 348.

§ 396d. Rules and regulations governing operations; limitations on oil or gas leases

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of any act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a-396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease. May 11, 1938, c. 198, § 4, 52 Stat. 348.

§ 396e. Officials authorized to approve leases

The Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted. May 11, 1938, c. 198, § 5, 52 Stat. 348.

§ 396f. Lands excepted from leasing provisions

Sections 396a, 396b, 396c, and 396d of this title shall not apply to the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma. May 11, 1938, c. 198, § 6, 52 Stat. 348; May 27, 1955, c. 106, § 2, 69 Stat. 68.

APPENDIX K

Articles 8, 9 and 11, ¶ 1, of the Treaty of Guadalupe Hidalgo Between the United States and Mexico, February 2, 1848, 9 Stat. 922:

ARTICLE VIII

RIGHTS OF MEXICANS ESTABLISHED IN TERRITORIES CEDED TO UNITED STATES

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax or charge whatever.

Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these and all Mexicans who may here-

after acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.

ARTICLE IX

HOW MEXICANS REMAINING IN CEDED TERRITORIES MAY BECOME CITIZENS OF THE UNITED STATES

Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the union of the United States, and be admitted at the proper time (to be judged of by the congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

ARTICLE XI

SUPPRESSION OF SAVAGE INDIAN RAIDS INTO MEXICO; PURCHASE OF CAPTIVES OR STOLEN PROPERTY PROHIBITED; RETURN OF CAPTIVES TO MEXICO *

Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States,

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* The obligations of the United States under Article XI were released by Article II of the Gadsden Treaty Between the United States and Mexico, December 30, 1853, 10 Stat. 1031.

is now occupied by savage tribes, who will hereafter be under the exclusive control of the government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the government of the United States whensoever this may be necessary; and that when they cannot be prevented, they shall be punished by the said government, and satisfaction for the same shall be exacted—all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within its own territory, against its own citizens.

* * * *

APPENDIX L

Executive Orders Pertaining to the Jicarilla Apache Reservation:

Jicarilla Apache Reserve.

[Pueblo Agency; area, 447½ square miles.]

EXECUTIVE MANSION, *March 25, 1874.*

It is hereby ordered that the following-described tract of country in the Territory of New Mexico, set apart as a reservation for the Jicarilla Apache Indians by the first article of an agreement concluded with the said Indians December 10, 1873, subject to the action of Congress, be, and the same is hereby, withdrawn from sale and settlement, viz: Commencing at a point where the headwaters of the San Juan River crosses the southern boundary of the Territory of Colorado, following the course of said river until it intersects the eastern boundary of the Navajo Reservation; thence due north along said eastern boundary of the Navajo Reservation to where it intersects the southern boundary line of the Territory of Colorado; thence due east along the said southern boundary of the Territory of Colorado to the place of beginning.

U. S. GRANT.

EXECUTIVE MANSION, *July 18, 1876.*

It is hereby ordered that the order of March 25, 1874, setting apart the following-described lands in the Territory of New Mexico as a reservation for the Jicarilla Apache Indians, viz: "Commencing at a point where the headwaters of San Juan River crosses the southern boundary of the Territory of Colorado, following the course of said river until it

intersects the eastern boundary of the Navajo Reservation; thence due north along said eastern boundary of the Navajo Reservation to where it intersects the southern boundary line of the Territory of Colorado; thence due east along the said southern boundary of the Territory of Colorado, to the place of beginning," be, and the same is hereby, canceled, and said lands are restored to the public domain.

U. S. GRANT.

EXECUTIVE MANSION, *September 21, 1880.*

It is hereby ordered that the tract of country in the Territory of New Mexico, lying within the following-described boundaries, viz: Beginning at the southwest corner of the Mexican grant known as the "Tierra Amarilla grant," as surveyed by Sawyer and McBroom in July, 1876; and extending thence north with the western boundary of said survey of the Tierra Amarilla grant to the boundary line between New Mexico and Colorado; thence west along said boundary line 16 miles; thence south to a point due west from the aforesaid southwest corner of the Tierra Amarilla grant; and thence east to the place of beginning, be, and the same is hereby, withheld from entry and settlement as public lands, and that the same be set apart as a reservation for the Jicarilla Apache Indians.

R. B. HAYES.

EXECUTIVE MANSION, *May 15, 1884.*

It is hereby ordered that the tract of country in the Territory of New Mexico set apart as a reservation for the Jicarilla Apache Indians by Executive

order dated September 21, 1880, be, and the same hereby is, restored to the public domain.

CHESTER A. ARTHUR.

EXECUTIVE MANSION, *February 11, 1887.*

It is hereby ordered that all that portion of the public domain in the Territory of New Mexico which, when surveyed, will be embraced in the following townships, viz:

27, 28, 29, and 30 north, ranges 1 east, and 1, 2, and 3 west; 31 and 32 north, ranges 2 west and 3 west, and the south half of township 31 north, range 1 west, be, and the same is hereby, set apart as a reservation for the use and occupation of the Jicarilla Apache Indians: *Provided,* That this order shall not be so construed as to deprive any bona fide settler of any valid rights he may have acquired under the law of the United States providing for the disposition of the public domain.

GROVER CLEVELAND.

It is hereby ordered that the following-described lands in New Mexico, viz: Beginning at the northeast corner of T. 26 N., R. 4 W.; thence east along the township line between Tps. 26 and 27 N. to the northwest corner of T. 26 N., R. 5 W.; thence due south to the southwest corner of T. 22 N., R. 5 W.; thence east on the township line between Tps. 21 and 22 N. to the southeast corner of T. 22 N., R. 1 W.; thence north to the northeast corner of T. 23 N., R. 2 W.; thence west to the southeast corner of T. 24 N., R. 4 W.; thence north to the southeast corner of

T. 26 N., R. 4 W.; thence east to the southeast corner of T. 26 N., R. 3 W.; thence north to the southeast corner of T. 27 N., R. 3 W.; thence east along the southern boundary of the present Jicarilla Indian Reservation to the range line between Rs. 1 and 2 W., in T. 27 N., be,

and the same are hereby, withdrawn from sale and settlement, and set apart for Indian purposes, for the use of the Indians of the Jicarilla Indian Reservation: *Provided*, That this withdrawal shall not affect any existing valid rights of any party.

THEODORE ROOSEVELT.

THE WHITE HOUSE, *November 11, 1907.*
(711.)

Whereas it is found that Executive order of November 11, 1907, setting apart certain lands for the use of the Indians of the Jicarilla Indian Reservation, N. Mex., conflicts in part with Executive order of November 9, 1907, setting apart certain lands as an addition to the Navajo Indian Reservation, N. Mex., said Executive order is hereby so amended that the description of the tract of land thereby set apart for the purpose named therein shall read as follows:

Beginning at a point on the south boundary of the Jicarilla Indian Reservation on the range line between Tps. 26 and 27 N., Rs. 2 and 3 W., New Mexico principal meridian; thence west on said boundary to the southwest corner of the reservation; thence continuing west on the township line between Tps. 26 and 27 N. to the northwest corner of T. 26 N., R. 5 W; thence east along the township line between Tps. 21 and 22 N. to the northeast corner of T. 21 N., R. 4 W.; thence

continuing east over unsurveyed lands along what would be, if established, the township line between Tps. 21 and 22 N. to what would be, if established, the southeast corner of T. 22 N., R. 2 W.; thence north over unsurveyed lands to what will be when established the northeast corner of T. 23 N., R. 2 W.; thence west over unsurveyed lands along what would be, if established, the township line between Tps. 23 and 24 N. to what would be, if established, the southeast corner of T. 24 N., R. 4 W.; thence north over unsurveyed lands to the southeast corner of T. 25 N., R. 4 W.; thence continuing north along the east line of T. 25 N., R. 4 W., to the southeast corner of T. 26, N., R. 4 W.; thence east over unsurveyed lands along what would be, if established, the township line between Tps. 25 and 26 N. to what would be, if established, the southeast corner of T. 26 N., R. 3 W.; thence north to the place of beginning.

THEODORE ROOSEVELT.

THE WHITE HOUSE, *January 28, 1908.*
(No. 743.)

NEW MEXICO.

CARSON NATIONAL FOREST, N. MEX.

Under authority of the act of Congress of June 4, 1897 (30 Stat., 11 at 34 and 36), and upon recommendation of the Secretary of Agriculture, it is hereby ordered that on and after March 1, 1912, the boundaries of the Carson National Forest, N. Mex., as proclaimed March 2, 1909, and modified by subsequent proclamation of August 24, 1910, be further modified by excluding therefrom all that part of the Jicarilla Apache Indian Reservation included in the said Carson National Forest by the said proclamation of March 2, 1909.

The purpose of this exclusion is to restore the Jicarilla Apache Indian Reservation in all respects to the status existing prior to the said proclamation of March 2, 1909, as though the inclusion of the lands within the Carson National Forest had not been ordered, and said Indian reservation is hereby fully recreated and restored to that status.

WM. H. TAFT.

THE WHITE HOUSE, *February 17, 1912.*
(No. 1476.)

[Source: Kappler, *Indian Affairs and Treaties*, Senate Committee on Indian Affairs, Washington 1913]

APPENDIX M

Article XI, Section 1, ¶¶(a) (3) and (e) of the Revised Constitution of the Jicarilla Apache Tribe:

ARTICLE XI—
POWERS OF THE TRIBAL COUNCIL

Section 1. The inherent powers of the Jicarilla Apache Tribe, including those conferred by Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of the Department of the Interior, and the restrictions established by this revised constitution.

(a) Management of tribal lands and natural resources:

* * * *

3. Resource Development. Tribal lands and natural resources may be developed for industrial or other purposes providing that such development is based upon sustained yield principles wherever applicable and provided that such development is designed for the general welfare of the tribe as a whole. The tribal council may enact ordinances to govern the development of tribal lands and other resources.

* * * *

(e) Taxes and fees. The tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation.

APPENDIX N

JICARILLA APACHE TRIBE

ORDINANCE OF THE TRIBAL COUNCIL

OIL AND GAS SEVERANCE TAX

Ordinance No. 77-0-02
as amended by Ordinance No. 77-0-195

WHEREAS, under the Constitution of the Jicarilla Apache Tribe, the Tribal Council may impose taxes and fees upon persons and corporations doing business on the Reservation, including non-members of the Tribe; and

WHEREAS, under the Constitution of the Tribe, the Tribal Council has the authority and the obligation to govern the development of Tribal lands and other resources, and to develop such resources on sustained yield principles for the general welfare of the Tribe as a whole; and

WHEREAS, the Tribe has substantial reserves of oil and natural gas, which have been extracted from Tribal lands and exported from the Reservation, as a result of which the Tribe's resources are being rapidly depleted; and

WHEREAS, the only means by which the Tribe can establish adequate reserve funds to provide for the general welfare of the Tribe after depletion of its oil and gas is to impose a severance tax on oil and gas production.

NOW, THEREFORE, BE IT RESOLVED: That effective on the date set forth hereinafter, a severance tax is imposed on any oil and natural gas severed, saved and removed from Tribal lands, as follows:

1. *Due Date of Tax*

Such taxes shall become due at the time of severance and payable monthly as herein provided.

2. *Rate of Tax—Gas*

The severance tax set forth herein shall be at the rate of $0.5 per million BTU of gas produced on the Jicarilla Apache Reservation and sold or transported off the Reservation.

3. *Rate of Tax—Oil*

The severance tax set forth herein shall be at the rate of $0.29 per barrel of crude oil or condensate as measured under the terms of this Ordinance, which is produced on the Jicarilla Apache Reservation and sold or transported off the Reservation.

4. *Exemption*

Royalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe shall be exempt from taxation.

5. *Payment of Tax by Whom*

The operator of each well shall be liable for payment of the taxes assessed by this Ordinance and shall make payments pursuant to the terms hereof.

6. *Production Reports and Payments*

Within 45 days following the end of each calendar month, each operator of a well shall, in the statutory form and manner provided herein, make a return to the Tribe showing its total volume of oil, gas and condensate and BTU of gas produced from each well on Tribal lands for said calendar month and the amount of tax due. All taxes due or to be remitted by the operator shall accompany the return. Any additional report or information the Treasurer of the Tribe may deem necessary for the proper administration of the severance tax may also be required.

7. *Measurement of Gas*

The determination of volume, specific gravity and heating value of gas (BTU content) on which tax shall be paid shall be as set forth in the contract in force between the lessee or operator of the wells on which the tax is payable, and the purchaser of such gas, as reported by the operator or producer to the U.S. Geological Survey. Measurements of volume and heating value shall be in accordance with standard industry practices.

8. *Measurement of Crude Oil*

Crude oil subject to tax shall be measured in accordance with current contracts of sale by the operator or producer and the purchaser of such oil and in accordance with standard industry practices.

9. *Severance Tax Fund Created*

There is created an Oil and Gas Severance Tax Fund, Jicarilla Apache Tribe. All monies received shall be held in suspense by the Treasurer of the Tribe in such fund until disbursed as hereinafter provided. The Treasurer of the Tribe may execute vouchers against this fund to make refund adjustments, payments of interest or payments for any purpose which this Ordinance may require.

10. *Reports by Treasurer, Transfer of Funds, Administration*

The Treasurer of the Tribe shall prepare a report to the Tribal Council of the Tribe semi-annually, as of June 30th and December 31st of each year, showing the amount of money collected and deposited in the Oil and Gas Severance Tax Fund, and such other information as is deemed necessary to determine the amount of money in the fund which is unencumbered. The Treasurer shall deduct from the unencumbered amount 5% of such amount for administration of this Ordinance.

Said reports shall be submitted to the Tribal Council within 90 days of the end of each reporting period. Within 30 days of the approval by the Tribal Council of said reports, the Treasurer of the Tribe shall transfer from the Oil and Gas Severance Tax Fund to the Oil and Gas Permanent Fund created by Tribal Ordinance No. 77-0-01, the amount of money which is reported to be unencumbered less 5% as above provided for administration of this Ordinance.

A Tax Administration Division is hereby established in the Treasurer's office, responsible to the Treasurer of the Tribe and the Tribal Council, with such personnel as shall be recommended by the Treasurer and approved by the Council. Expenses of said division shall be paid out of the 5% administration fund above established, as budgeted by the Tribal Council. Funds not expended or committed at the end of each fiscal year shall revert to the general fund of the Tribe.

11. *Tax Refunds*

Any person paying any tax erroneously may apply for a refund within 30 days from the date of payment of tax to the Treasurer of the Tribe, and the Treasurer shall have the authority and duty with the concurrence of the Natural Resources Committee of the Tribal Council to refund such tax if found to be erroneously paid. Any refund may, in the discretion of the Natural Resources Committee of the Tribe, be in the form of credit against future tax payments.

12. *Taxes May be Paid Under Protest*

A person paying such tax may pay such tax under protest by filing a notice of protest with the Treasurer of the Tribe at the time of payment. The protest shall be referred to the Natural Resources Committee of the Tribe by the Treasurer, as to whether the protested tax shall be refunded and a report shall be made to the

Tribal Council within 45 days after the payment of the protested tax recommending disposition of said protest. The Tribal Council shall make a final decision as to the refund of said tax. If any tax shall be found to be erroneously or illegally collected, interest at the rate of 4% per annum shall be allowed on the amount erroneously or illegally collected. In the event the Tribal Council of the Tribe decides adversely to the protestant, the protestant may take whatever legal action is appropriate under the laws of the United States. Any amount of tax not paid when due shall bear 1% interest per month or a fraction thereof until paid.

13. *Consent to Suit*

For purposes of enforcement under §§ 11 or 12 hereof, the Jicarilla Apache Tribe consents to be sued either in the United States District Court for the District of New Mexico or in the Jicarilla Apache Tribal Court. The Tribe does not consent to be sued in the state courts of New Mexico.

14. *Severability*

If any part or application of this Ordinance is held invalid, the remainder of the Ordinance or its application to other situations or persons shall not be affected.

15. *Effective Date*

The effective date of this Ordinance shall be the first of the fourth month following the approval of this Ordinance by the Tribal Council of the Tribe and the Secretary of the Interior or his authorized representative.

Adopted by the Tribal Council July 9, 1976

Approved by the Secretary of the Interior December 23, 1976

April 23, 1977

THE JICARILLA APACHE TRIBE

[SEAL]

TO: ALL OIL AND GAS LESSEES, OPERATORS AND PURCHASING COMPANIES DOING BUSINESS ON THE JICARILLA APACHE RESERVATION

Enclosed is a copy of the Oil and Gas Severance Tax Ordinance No. 77-0-02 enacted by the Tribal Council of the Jicarilla Apache Tribe on July 9, 1976 and approved on behalf of the Secretary of the Interior December 22, 1976.

The Oil and Gas Severance Tax Ordinance levies a severance tax of 5¢ per million BTU of gas produced on the Jicarilla Apache Reservation and sold or transported off the reservation, and a severance tax of 29¢ per barrel of crude oil or condensate, as measured under the terms of the ordinance, which is produced on the Jicarilla Apache Reservation and sold or transported off the reservation.

The effective date of the severance tax is the first day of the fourth month following the approval of the ordinance by the Tribal Council and the Secretary of the Interior or his authorized representative. The effective date of the tax is April 1, 1977, and initial Operator's Report Remittance forms are due in the Accounting Office of the Tribe for the month of April, 1977, within 45 days after April 30, 1977. Initial tax remittances are also due at that time.

Enclosed for your reference is the Operator's Remittance Report form to be used in reporting taxes remitted. Instructions for completion of the report are printed on the back of the report.

Thank you for your cooperation.

JICARILLA APACHE TRIBE

No. 80-15
(Consolidated with No. 80-11)

NOV 20 1980

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMOCO PRODUCTION COMPANY and
MARATHON OIL COMPANY,
Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, TREASURER OF THE JICARILLA APACHE TRIBE, and CECIL ANDRUS, Secretary of the Interior,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR PETITIONERS

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Respondents.

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BRIEF FOR PETITIONERS

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Jicarilla Apache Tribe has power to tax severance of oil and gas from its Executive Order Indian reservation by non-Indian lessees.

2. Whether overriding national interests expressed in the congressional grant to the states of the power to tax

oil and gas production from reservation lands are frustrated by tribal taxation of the same production.

3. Whether a power to tax founded upon the power to exclude non-members or attach conditions to their entry includes the power to impose a new tribal severance tax on mineral lessees.

4. Whether the Indian and Interstate Commerce Clause of the Constitution bars a tribal tax upon severance from reservation lands of oil and gas, most of which is delivered into interstate commerce:

a. As discriminating against interstate commerce, where the tax applies only to oil and gas "sold or transported off the Reservation,"

b. As burdening interstate commerce itself, where the tax applies only after the oil and gas have been placed in transit beyond the Reservation's borders and into interstate commerce, or

c. As imposing a multiple burden upon interstate commerce, where the state in which the Reservation is located taxes the same activity.*

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* *List of other parties.* The only other parties not listed in the caption are petitioners in No. 80-11 consolidated with this case. They are: J. Gregory Merrion and Robert L. Bayless, d/b/a Merrion and Bayless, Jerome T. McHugh, Chase Oil Company, Dugan Production Corporation, Consolidated Oil and Gas, Inc., Southland Royalty Company, Tesoro Petroleum Corporation, Amerada Hess Corporation, Supron Energy Corporation, Energy Reserves Group, Inc., J. M. Huber Corporation, Continental Oil Company (now Conoco Inc.), Atlantic Richfield Company, Phillips Petroleum Company, Tenneco Oil Company, Getty Oil Company, Gulf Oil Corporation, Mobil Oil Corporation and Oxy Petroleum, Inc.

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OPINIONS BELOW

The Opinion and Judgment of the Court of Appeals appears at pp. 139-97 of the Joint Appendix (J.A.), and is reported at 617 F.2d 537. The Order of the Court of Appeals amending its Opinion and denying a Petition for Rehearing appears at J.A. 199-202. No opinion was rendered by the United States District Court for the District of New Mexico. That Court's Findings of Fact and Conclusions of Law appear at J.A. 127-33, and its Judgment appears at J.A. 135.

JURISDICTION OF THIS COURT

The Opinion and Judgment of the Court of Appeals was entered on February 22, 1980. A timely petition for rehearing filed by the Petitioners in No. 80-11 was denied, and the Opinion was amended by the insertion of a new page 6, on April 25, 1980. By Orders dated May 9, 1980 and June 12, 1980, the time of Petitioners Amoco and Marathon to file their petition in No. 80-15 was extended to and including July 5, 1980. The petition in No. 80-11 was filed on July 3, 1980, and the petition in No. 80-15 was filed on July 5, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISION, TREATY, STATUTES, ORDINANCES AND EXECUTIVE ORDERS INVOLVED

The constitutional provision involved is the Interstate and Indian Commerce Clause, art. I, § 8, cl. 3 (App. 1a).[1] The treaty involved is the Treaty of Guadalupe Hidalgo Between the United States and Mexico, 9 Stat. 922 (1848) (App. 1a-3a). The statutory provisions involved are the Act of March 3, 1927, 25 U.S.C. §§ 398a-e (1976) (App. at 3a-7a); Sections 16 and 17 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. §§ 476-77 (1976) (App. 7a-9a); and the General Leasing Act of May 11, 1938, 25 U.S.C. §§ 396a-f (1976) (App. 9a-12a).

[1] This and similar references are to the Appendix to this brief.

This case also involves Article XI, Section 1, ¶¶ (a) (3) and (e) of the Revised Constitution of the Jicarilla Apache Tribe (App. 12a-13a); the Jicarilla Apache Tribe Oil and Gas Severance Tax Ordinance and accompanying instructions (App. 13a-19a), and Executive Orders relating to the Jicarilla Apache Reservation (App. 20a-24a).

STATEMENT OF THE CASE

This action was commenced in the United States District Court for the District of New Mexico on June 14, 1977 by these Petitioners filing a complaint praying for a judgment declaring that a severance tax imposed by the Jicarilla Apache Tribe ("the Tribe") on the production of oil and gas on the Jicarilla Apache Reservation was unlawful and for an injunction against the collection of the tax (J.A. 43). A similar action was filed by the Petitioners in No. 80-11 (J.A. 1). Following a non-jury trial, the Court on December 29, 1977, entered findings of fact and conclusions of law and entered a judgment holding that the tax was unlawful and enjoining its enforcement (J.A. 127-35). On appeal, the judgment was reversed by a divided United States Court of Appeals for the Tenth Circuit sitting en banc. 617 F.2d 537 (J.A. 139-97). This Court granted certiorari on October 6, 1980, and consolidated the cases.

The Tribe resides in an area in Northwestern New Mexico that was ceded to the United States by the Treaty of Guadalupe Hidalgo (App. 1a) in 1848, after the Mexican-American War. The Tribe was not recognized in the Treaty as a sovereign entity or mentioned in any other way. The lands occupied by the Tribe were made into a reservation by Executive Order (App. 20a-24a). The Tribe is organized under the Indian Reorganization Act of 1934. It is undisputed that no treaty or act of Congress has ever provided expressly that the Tribe has any power to impose taxes of any kind upon non-Indians (J.A. 145).

Petitioners are engaged in the extraction of oil and gas from the Tribe's reservation lands under various leases issued by the Tribal Council and approved by the Secretary of the Interior (J.A. 129, 141). Approximately 80% of the oil and gas extracted from the Reservation is delivered at the well-head into interstate pipelines for shipment and sale outside the State of New Mexico (J.A. 129, 143). All the leases were issued prior to enactment of the Tribal Severance Tax Ordinance in 1976. The leases provide for the payment of royalties to the Tribe, specify that no change may be made in the rate of "royalty or annual rental" without the written consent of both parties, and contain no provision expressly reserving to the Tribe any power to impose taxes upon the lessees (J.A. 27).

Pursuant to authority granted in 1927 (25 U.S.C. § 398c (1976)), the State of New Mexico has taxed the production of oil and gas from the Tribe's Reservation since 1937 and collects such taxes from Petitioners.[2]

In 1968, the Tribe adopted a Revised Constitution authorizing the Tribal Council to adopt ordinances imposing taxes and fees on non-members of the Tribe doing business on the Reservation (J.A. 129, 142; App. 12a). In 1976, the Tribal Council adopted an ordinance entitled "Oil and Gas Severance Tax" imposing a tax on "any oil and natural gas severed, saved, and removed from Tribal lands" (J.A. 129, 143; App. 13a). The Revised Constitution and the Ordinance imposing the tax were approved by the Secretary of the Interior, through his delegates (J.A. 129, 143). The Ordinance and the instructions mailed to lessees specified that the tax applied only to oil or gas "sold or transported off the Reservation" (J.A. 130, 143; App. 13a-19a). The Ordinance also expressly consented to the jurisdiction of the United

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[2] *See* N. M. Stat. Ann. §§ 7-29-1 to 7-29-22; §§ 7-30-1 to 7-30-26; §§ 7-31-1 to 7-31-25; §§ 7-34-1 to 7-34-20 (1978); 1937 N. M. Laws, Ch. 103.

States District Court for actions concerning the tax (App. 17a).

The suit filed by Petitioners challenging the Tribal tax invoked jurisdiction under the Fifth Amendment and 28 U.S.C. §§ 1331 and 1343(4) (1976). The District Court held the tax invalid on the following grounds: (1) neither tribal sovereignty nor the Indian Reorganization Act empowered the Tribe to enact the tax; (2) 25 U.S.C. § 398(c) (1976) grants the State of New Mexico the exclusive right to tax lessees; and (3) the tax discriminates against and is a multiple burden on interstate commerce in violation of the Commerce Clause (J.A. 131-33).[3] The Court of Appeals reversed (J.A. 139), Chief Judge Seth and Judge Barrett dissenting (J.A. 165, 176).

The Court of Appeals rejected the grounds relied on by the District Court and held: First, that the Tribe has power to impose a tax upon non-Indians for the severance of oil and gas from its Executive Order reservation lands without benefit of express authorization in a treaty (J.A. 145-52); second, that the Tribe's power to tax was not preempted by the Act of Congress (25 U.S.C. § 398c (1976)) expressly authorizing the states to tax the same activity or by the comprehensive congressional regulation of mineral leasing on Indian reservations (J.A. 157-61); and third, that the Tribe's tax did not violate the Interstate and Indian Commerce Clause either by discriminating against or imposing a multiple burden upon interstate commerce (J.A. 152-56).

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[3] Petitioners also sued the appropriate New Mexico official seeking a declaratory judgment as to the validity of the New Mexico tax in the event that the Tribal severance tax should be upheld. Since the District Court found the Tribal tax invalid, it was not necessary to consider Petitioners' claims against the State, and they were dismissed without prejudice and with leave to refile in the event that the final judgment in this case should reinstate the Tribal tax (J.A. 137). Petitioners are paying the state tax under protest and have filed statutory refund suits which are being held in abeyance pending final judgment in this case.

SUMMARY OF ARGUMENT

I. Whatever power Indian tribes may have to tax non-members rests—not on general notions of Indian sovereignty—but on the power to exclude persons from their reservations. This power to exclude was the ground used to uphold a cigarette tax on non-Indian purchasers in last term's *Colville* case.[4] But this power to exclude cannot justify the instant severance tax. The Jicarilla Tribe is not here seeking "to tax non-Indians entering the reservation to engage in economic activity." Petitioners are already on the Reservation under valid leases, approved by the Tribal Council and the Secretary of the Interior, which specifically provide that royalties may not be increased without Petitioners' consent. The tax must accordingly fall since no treaty or statute authorizes it, it is inconsistent with the Tribe's dependent status, and it cannot be rooted in any notion that the Tribe has general sovereign powers over Petitioners or any right as landowners to tax.

II. Even if the power to exclude were available, this tax still falls. As stated in *Colville*, Indian taxing power may be divested by "federal law" or by inconsistency "with the overriding interests of the National Government." The tax is divested on both of these grounds.

1. The Jicarilla tax is preempted by the Act of March 3, 1927. This Act—which settled a controversy as to whether Executive Order Indian reservations should be leased as public domain or leased for the benefit of the Indians—gave the royalty interest to the Indians and expressly gave the states the power to tax all production, including the royalty share of the Indians. In so doing, Congress was following a consistent pattern of dealing with various kinds of Indian lands, in all of which the Indians were given royalties and the states were given

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[4] *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, —— U.S. ——, 100 S. Ct. 2069 (1980), hereinafter cited as "*Colville*".

the power to tax. In accordance with this consistent Congressional policy, New Mexico and other western states have long taxed production from Indian lands without challenge or any suggestion that the Indians have any power to tax the same production.

2. This long-standing recognition that the states have the power to tax to the exclusion of the Indians is reinforced by overriding national interests which also bar the instant tax.

a. The leasing of Indian lands for oil and gas and other minerals is subject to comprehensive and detailed regulation by the federal government. Just as such pervasive federal regulation preempts state taxation of Indians under the principles of this Court's decisions in *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965); and *White Mountain Apache Tribe* v. *Bracker*, —— U.S. ——, 100 S. Ct. 2578 (1980), so should it preempt this Indian attempt to tax non-Indians.

b. The burden of the tax, and the intention to use it to control production, are contrary to our national goals of increasing domestic energy supplies and reducing our dependence on foreign sources.

III. The tax offends the Commerce Clause in three respects:

1. It discriminates against interstate commerce by taxing only oil and gas which is removed *from* and sold or transported off the Reservation. Production which remains *in*, or is sold *on* the Reservation is not taxed. Such a preference for local commerce is invalid. *Boston Stock Exchange* v. *State Tax Commission*, 429 U.S. 318 (1977).

2. Furthermore, the tax is imposed on the act of interstate commerce itself. It is not imposed on the act of severance, but rather is applied after the production has been placed in transit beyond the Reservation borders.

Such a tax, after transmission in commerce has begun, comes too late and cannot stand. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954).

3. Even if the foregoing defects were remedied by amending the Tribal Ordinance to make it a true severance tax, the tax would still be invalid as a multiple burden on commerce. Two "sovereigns," New Mexico and the Tribe, would be taxing the same event and neither would be required to apportion. In these circumstances, the Tribe's tax must fall, *cf. Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), since Congress has specifically authorized the New Mexico tax.

ARGUMENT

I. THE SOVEREIGN POWERS OF SELF-GOVERNMENT OF THE JICARILLA APACHE TRIBE DO NOT INCLUDE THE POWER TO TAX PRODUCTION BY MINERAL LESSEES PURSUANT TO EXISTING LEASES ON EXECUTIVE ORDER RESERVATIONS.

The decision of the Tenth Circuit upholding the Jicarilla tax as an attribute of tribal sovereignty rests upon three separate, albeit mistaken conclusions: (1) that existing authorities, including decisions of this Court, have recognized a sovereign tribal power to tax mineral production by non-member lessees on Executive Order reservations; (2) that there is "no essential difference" between a taxing power based upon the right to exclude and the one asserted by the Tribe over Petitioners who are on the Reservation pursuant to valid, existing leases; and (3) that the imposition of the Tribal tax does not implicate vital national interests.

A. *Colville's* recognition of a power to tax non-members is premised on the power to exclude which is not applicable here.

The starting point for analysis of an Indian tribe's power to tax non-members is the recent *Colville* decision. In upholding a tribal tax upon the sale of cigarettes to non-Indians within the reservation's borders, this Court made clear that the power to tax was based on the tribe's power to exclude non-members from the reservation or to attach conditions to their entry. This is the conclusion of the opinions of the Executive Branch relied upon by the Court, and summarized in 55 I.D. 14, 46 (1934):

> "Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and *over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.*"

(Quoted in *Colville, supra*, 100 S. Ct. at 2081 (emphasis added)). Likewise, as this Court explained, the federal courts "have acknowledged tribal power to tax non-Indians *entering* the reservation to engage in economic activity." *Ibid* (emphasis added).[5] The Court also noted that the relevant treaties had recognized "inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter. . . ." *Id.* at 2082.

The decision in *Colville* is a reaffirmation of existing law, not a departure from it. It confirms a principle

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[5] The Executive Branch authorities and court decisions cited in *Colville* all involved permit or license fee taxes attached as a condition to entry. They also make clear that the power to exclude "intruders" from a reservation does not apply to persons "holding permits from one of these Indian tribes to reside within their limits. . . ." 17 Op. Att'y Gen. 134, 135 (1881). *See also* 18 Op. Att'y Gen. 34 (1884) (upholding the validity of such permit laws,

sometimes established expressly by treaty, and sometimes regarded as inherent: That a tribe possesses "the right . . . to control the presence within the territory assigned to it of persons *who might otherwise be regarded as intruders*, and . . . to attach conditions to the presence within its borders of persons *who might otherwise not be entitled to remain within the tribal territory.*" *Morris* v. *Hitchcock*, 194 U.S. 384, 389 (1904) (emphasis added).

The Tenth Circuit failed to perceive the true nature of the Jicarilla tax, which is vastly different from those taxes previously endorsed by this Court. Unlike the taxes upheld in *Colville* and in *Morris* v. *Hitchcock*, the Jicarilla tax cannot be justified as an exercise of the Tribe's power to exclude. The crucial distinction here is that the Tribe seeks to impose a tax after entry upon the Reservation has been made pursuant to leases on specified terms (including payment of bonus, rental, and royalties) negotiated and mutually accepted by the parties which cannot be changed without the consent of the lessees (J.A. 27). The impact of the tax here is not optional; Petitioners have already made substantial commitments which they may not avoid simply by remaining outside the Reservation, as could the cigarette buyers in *Colville* and the cattle owners in *Morris*.[6] The Tribe is not

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noting that a treaty provision which denied the Tribe the power to govern non-members or their property did not affect the right to impose a permit tax, as the permit tax was based on exercise of the power to exclude or attach conditions to entry).

[6] In *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), the principal lower federal court case upholding permit taxes, Circuit Judge Sanborn described the optional nature of the tax as follows:

> The permit tax of the Creek Nation, which is the subject of this controversy, is the annual price fixed by the act of its national council, which was approved by the President of the United States in the year 1900, for the privilege which it offers to those who are not citizens of its nation of trading within its borders. The payment of this tax is a mere condition of

asserting a power to exclude. The severance tax it attempts to impose affects the property rights of nonmembers who have entered the Reservation pursuant to contract and who have, in reliance upon those contracts, invested considerable sums in production and gathering facilities. The reach of the tax exceeds *Colville* and must fall.[7]

B. The tax cannot be justified on any other ground.

The tax cannot be upheld on any of the other grounds relied upon by the Tenth Circuit. First, the tax cannot be justified on any general or "platonic" notions of Indian sovereignty. *Cf. McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172 (1973). Not only is such "sovereignty" of a limited nature, which is subject to plenary control by Congress, but it is also restricted by the dependent status of the Indian tribes. In fact, this "dependent status" precludes any general power over non-Indians. Indian tribal sovereignty is limited to tribal "self-government." *United States* v. *Wheeler*, 435 U.S.

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the exercise of this privilege. No noncitizen is required to exercise the privilege or to pay the tax. He may refrain from the one and he remains free from liability for the other. Thus, without entering upon an extended discussion or consideration of the question whether this charge is technically a license or a tax, the fact appears that it partakes far more of the nature of a license than of an ordinary tax, because it has the optional feature of the former and lacks the compulsory attribute of the latter. 135 F. at 949.

[7] Even if the Tribe had the powers of a state or the federal government, there would be serious doubt that the Tribe could so "increase the take" and repudiate its contractual obligations. If such a tax were imposed by a state or the federal government under similar circumstances, it would raise serious problems under the contract clause or the due process taking clause of the Fifth Amendment. *See Puerto Rico* v. *Russell & Co.*, 315 U.S. 610 (1942); *Murray* v. *Charleston*, 96 U.S. 432 (1877); *cf. Perry* v. *United States*, 294 U.S. 330, 350-54 (1935); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 21-30 (1977).

313, 326 (1978). The tribe is sovereign in that it has the power, derived from its inherent sovereignty as distinct from any grant from the federal government or the states, to regulate its " 'internal and social relations.' " *White Mountain Apache Tribe* v. *Bracker*, *supra*, 100 S. Ct. at 2583. However, because of their dependent status, Indian tribes are prohibited from governing "every person within their limits except themselves." *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 147 (1810), quoted in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). As explained in *United States* v. *Wheeler*, *supra*, the Indians have "implicitly lost" part of their sovereignty "by virtue of their dependent status" and the "areas in which such implicit divestiture of sovereignty . . . have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." Accordingly, tribes may not try nonmembers in tribal courts even for offenses committed on Indian reservations, *ibid.*, and *Oliphant* v. *Suquamish Indian Tribe*, *supra*. The same principles should preclude power to tax non-Indians, except as a condition of entry.[8]

Just as exercise of tribal criminal jurisdiction over non-members offends principles of individual liberty guaranteed by the Constitution, *Oliphant*, *supra*, the Tribe's attempt to exercise general powers of taxation over non-members is inconsistent with constitutional protection of property rights and participation in government. The provisions of the Constitution and Bill of Rights do not apply to Indian tribes in exercise of their

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[8] As noted in *Colville*, the "commonly shared presumption" (*cf. Oliphant*, *supra*, at 206) is that the power to tax non-Indians rests on the power to exclude and thus to attach conditions to entry, and this limited power is not "implicitly divested by virtue of the Tribes' dependent status." 100 S. Ct. at 2081. There is no "commonly shared presumption" of any broader taxing power over non-Indians, and any such power would be inconsistent with the dependent status of Indian tribes under the principles of *Oliphant* and *Wheeler*, *supra*.

powers of self-government involving members. Although the Indian Civil Rights Act, 25 U.S.C. § 1302 (1976), imposed certain restrictions upon tribal governments, the restrictions imposed are "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56-57 (1978). *See also Barta* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553, 556-57 (8th Cir. 1958). The only remedy for a violation of rights guaranteed by the Indian Civil Rights Act is the "privilege of the writ of habeas corpus." *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 58, *quoting* 25 U.S.C. § 1303 (1976). As individual or corporate citizens of the United States and the states, exercising rights granted under leases issued pursuant to federal law, Petitioners should have the right to depend upon the exact provisions of the United States Constitution for protection of their property rights, and should not involuntarily be made subject to taxation at the hands of a legislative body in which they can never have any voice.[9] If the Tribe can exercise this governmental power over non-members, then it cannot be denied other powers of economic regulation normally exercised by sovereigns. May the Tribe regulate the price of oil and gas at the wellhead, or establish production and spacing allowables to restrict the rate of development to the Tribe's "sustained yield" philosophy? [10] If the Tribe may impose this tax, may it impose an income tax or windfall profits tax upon these Petitioners? The tribes vigorously assert the right to govern non-

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[9] *See* dissenting opinion of Chief Judge Seth (J.A. 170-71). While it is true that a resident of Colorado cannot object to New Mexico taxing his property in New Mexico, the Constitution guarantees that citizen the right to move to New Mexico, establish residence, and participate in government. No such right to participation can ever exist for non-members of the Tribe.

[10] *See* Article XI, § 1(a), Revised Constitution of the Jicarilla Apache Tribe (App. 12a).

members and to promote their economic status through regulation and taxation. Our federal system cannot permit recognition of nation-states of Indian tribes exercising governmental powers over non-members, unfettered by constitutional restraints.[11]

History confirms the lack of inherent sovereign power to tax non-Indians except as a condition to entry. As noted by Chief Judge Seth in dissent (J.A. 165-75), the Jicarillas had not exercised any sovereign power over non-Indians during the Spanish or Mexican occupations, and none was granted to them in the Treaty of Guadalupe Hidalgo. (*See* App. 1a-3a).[12] Indeed, it is undis-

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[11] *See* Act of March 3, 1871, 16 Stat. 566 (1871), 25 U.S.C. § 71 (1976). *See also* dissent of Chief Judge Seth (J.A. 169).

[12] Tribal assertions of general powers of taxation over non-members are very recent. In addition to the Jicarilla severance tax, the Navajo Tribe enacted "possessory interest" and "business activity" tax ordinances in 1978; both will affect mineral production. *See* Amicus Brief of Navajo Nation in the Tenth Circuit, Exhibit B-2. The Crow Tribe enacted a coal severance tax in 1976. *See* Amicus Brief of National Congress of American Indians, Inc., in *Colville, supra*, at 20. The Shoshone and Arapahoe Tribes of the Wind River Reservation enacted a severance tax in 1978, which became effective in 1980, after the decision of the Tenth Circuit in this case. Any tribe that has leased mineral resources for development can be expected to enact mineral taxes in the wake of the Tenth Circuit decision here.

The new Indian taxes are under challenge in a number of lawsuits. *See, e.g., Amoco Prod. Co.* v. *Harris*, C-80-0208 (U.S.D.C. Wyo., filed Jul. 15, 1980) (challenging the Shoshone and Arapahoe tax). The Amicus Brief of the Navajo Nation in the Tenth Circuit (p. 2) stated that six actions are presently pending in U.S. District Courts challenging the validity of the Navajo tax. One suit has been briefed and awaits argument in the Ninth Circuit. *Salt River Project Agricultural Improvement and Power District* v. *Navajo Tribe of Indians*, No. 78-352 (D. Ariz. Jul. 11, 1978), *appeal docketed*, Nos. 78-3492 and 79-3028 (9th Cir. Oct. 13, 1978). Another case was recently decided in Utah. *Southland Royalty Company* v. *Navajo Tribe of Indians*, Nos. C-79-0140, -0153, -0237, -0296 (D. Utah June 5, 1980) (adhering to the Opinion of the Tenth Circuit in this case).

puted that no treaty or statute expressly gives the Tribe any power to tax (J.A. 145).[13] No general power to tax non-Indians can be drawn from the Indian Reorganization Act. That Act does not mention taxation in confirming to the tribes "all powers . . . vested by existing law" (App. 8a) and, as shown above, that "existing law" is limited to taxation as a condition of entry.

Nor can the Tribe's taxing power spring from its "ownership" of the minerals underlying its Executive Order reservation. "Ownership" of real property does not by itself create the power to tax severance of products of the soil.[14] Moreover, the "title" of the Jicarilla is of a peculiar and limited character. The Executive Orders relating to the Jicarilla Apache Reservation do not grant "title" in the Reservation to the Tribe; rather, they merely "set apart" specified portions of land "as a reservation for the use and occupation of the Jicarilla Apache Indians." (App. 20a-24a). The Jicarillas' right of occupancy is subject to the plenary power of Congress to control use; they are tenants at will whose tenancy can be terminated without compensation. *Sioux Tribe of Indians* v. *United States*, 316 U.S. 317, 327 (1942); *United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676, 686-87 (9th Cir. 1976). Prior to the Act of March 3, 1927, 25 U.S.C. §§ 398a-c (1976) (App. 3a-5a), the minerals underlying Executive Order reservations had been leased as part of the public domain, with the tribes receiving nothing. The royalties the Jicarillas

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[13] The Tenth Circuit recognized that the Jicarilla Tribe's assertion of taxing power could not be founded on the Treaty. By contrast, the tribal power to tax upheld by this Court in *Morris* v. *Hitchcock*, *supra*, and relied upon by the Tenth Circuit, was based in part on treaty rights explicitly granting the tribes the power to impose permit taxes.

[14] Conversely, lack of ownership seldom precludes a government from exercising its taxing power. Thus, the State of New Mexico may tax the severance of the Jicarillas' mineral wealth even though New Mexico lacks any ownership interest in it.

receive today flow from rights created under that Act. Thus, their power to tax cannot be based upon any aboriginal ownership rights enjoyed by the Jicarillas over the minerals lying beneath their Executive Order reservation. Unquestionably the Tribe has an interest in the production of oil and gas from its Reservation; but the nature and extent of that interest have been created and limited by legislation which grants the Tribe the bonuses, rentals and royalties, and the states the power of taxation.

Finally, the Tenth Circuit erred in finding that the tax was "not inconsistent with the superior interests of the United States as a sovereign nation." As shown in the succeeding Parts II and III of this brief, the Tribal tax thwarts federal energy policy, upsets the balance of interests established by Congress in the 1927 Act (App. 3a), impairs the power of the states to raise revenue, impedes the free flow of commerce, and creates discriminatory differences in areas requiring national uniformity. Thus, the tax cannot be justified as a product of a retained power not inconsistent with federal interests. In fact, the dependent status of the Tribe precludes the exercise of such taxing power over non-Indians under the principles of *Wheeler* and *Oliphant*, *supra*.

II. ANY TRIBAL POWER TO TAX MINERAL PRODUCTION ON EXECUTIVE ORDER RESERVATIONS HAS BEEN DIVESTED BY CONGRESSIONAL ACTION AND OVERRIDING NATIONAL POLICIES.

Even if the Jicarillas had formerly enjoyed a general sovereign power to impose severance taxes on non-Indians, which we dispute, that power was long ago preempted by Congress in its plenary authority over the Tribe. In *Colville*, this Court held that Indians could, in exercising their power to exclude, tax transactions occurring on their lands and significantly involving their

interests unless "divested of it by federal law" or by necessary implication where such action would be "inconsistent with the overriding interests of the National Government." 100 S. Ct. at 2081. The Jicarilla Tribe is divested of its power to impose this tax for both of these reasons.

A. The Act of March 3, 1927 grants the states exclusive power to tax oil and gas production on Executive Order reservations.

After extensive debate and one failed attempt, Congress in 1927 enacted legislation authorizing the leasing of Executive Order reservation land which gave the tribes living thereon the right to all "rentals, royalties, or bonuses" derived from the leases, 25 U.S.C. § 398b (1976) (App. 4a); and to the states in which such reservations were located, the power to tax the entire output of oil and gas produced including the Indians' royalty share, 25 U.S.C. § 398c (1976) (App. 4a-5a). A review of the historical events prompting the passage of the 1927 Act leaves no doubt that its purpose and effect were to preempt the tribes from taxing mineral production from Executive Order reservations.

The first general statute authorizing leasing of Indian lands for mining was the Act of February 28, 1891, 25 U.S.C. § 397 (1976). This Act was applicable to lands "occupied by Indians who have bought and paid for the same" and was silent regarding taxation. The Act of June 30, 1919 (25 U.S.C. § 399 (1976)) authorized leasing of unallotted lands within reservations in several states (including New Mexico) for mining purposes and recognized the rights of the states to "levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee"; a 1926 amendment excluded oil and gas leases.

In 1924, Congress enacted what is now 25 U.S.C. § 398 (1976). That Act (43 Stat. 244) referred to the 1891

Act (25 U.S.C. § 397 (1976)) and itself authorized oil and gas leasing of unallotted Indian lands subject to leasing under the 1891 Act. Apparently because of the "bought and paid for" language in § 397, the 1924 Act was thought to apply only to treaty reservations. *See, e.g.*, 67 Cong. Rec. 10914 (1926). The 1924 Act specifically recognizes the states' right to tax oil and gas production from such Indian lands.[15]

In 1920 Congress passed the Mineral Leasing Act ("the 1920 Act") (41 Stat. 139 (1919)), one of many steps designed to encourage oil and gas leasing on public land. This Act authorized the leasing of public domain lands held by the United States, under a scheme which accorded 37½% of the value of sales, bonuses, royalties and rents collected under the Act to the states;[16] 52½% to a federal reclamation fund; and 10% to the Treasury Department. The 1920 Act explicitly preserved "the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States." 30 U.S.C. § 189 (1976). *See Mid-Northern Oil Co.* v. *Walker*, 268 U.S. 45 (1925). The result was both to expedite the leasing and production of minerals on federal lands and to engender a controversy in the Executive Branch which prompted passage of the 1927 Act.

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[15] 25 U.S.C. § 398 (1976) thus provides in part:

> *Provided*, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: *Provided, however*, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.

[16] The states' share was increased to 50% in 1976. *See* 30 U.S.C. § 191 (1976).

Two years after passage of the 1920 Mineral Leasing Act, the Interior Department, acting on what this Court has termed the Executive Branch's "consistent . . . understanding" that "the rights and interests which the Indians enjoyed in executive order reservations were different from and less than their rights and interests in treaty or statute reservations," *Sioux Tribe of Indians* v. *United States, supra*, 316 U.S. at 327,[17] publicly took the position that Executive Order Indian reservations were subject to leasing as public domain under the 1920 Act. 49 L.D. 132 (1922). Accordingly, the Secretary issued various prospecting permits under the 1920 Act. Attorney General Stone subsequently took a contrary view, contending that the rights of tribes on treaty and Executive Order reservations were essentially equivalent, and that since the 1920 Act did not authorize the leasing of treaty lands, it did not apply to Executive Order reservations either. (34 Op. Att'y Gen. 171 (1924)). When the Attorney General sued to cancel the outstanding permits,[18] Congress sought to resolve the matter by passing the 1927 Act.

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[17] The court held in *Sioux Tribe* that the interest which the Indians received in Executive Order reservations was "subject to termination at the will of either the executive or Congress" without payment of compensation because the executive acting alone was without power to create a compensable interest in public lands. 316 U.S. at 331. *Accord, Confederated Bands of Ute Indians* v. *United States*, 330 U.S. 169, 175-76 (1947); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 103 (1949).

[18] The government's attempt to cancel the permits already issued was rejected by the District Court in Utah on April 27, 1925. *See United States* v. *Harrison*, Equity No. 8288 (D. Utah 1925), discussed in H.R. Rep. No. 1791, 69th Cong., 2d Sess. 5 (1927). The Court of Appeals certified questions to this Court on December 10, 1925, but the case was dismissed by stipulation on March 14, 1927, following passage of the 1927 Act. *See United States* v. *McMahan* [*Harrison*], 273 U.S. 782 (1927).

The legislative history of that Act reveals that controversy persisted in the Congress between advocates of the states, the tribes, and those who had obtained permits in reliance on the Department of the Interior's 1922 ruling. The initial version of the bill paralleled the provisions of the 1920 Act. It authorized the leasing of Executive Order lands; retroactively protected those who had undertaken exploration in reliance upon permits issued by the Secretary; but provided a division of royalties between the states and the federal government similar to that under the 1920 Mineral Leasing Act. The states were to receive the same 37½% of all bonuses, rents and royalties from leased lands and the Treasury, 10%; however, the tribes were to receive 52½%, instead of the federal reclamation fund.

The proposed bill was attacked from all sides. Those who, like the Secretary of the Interior, believed that Executive Order Indians enjoyed no rights to the minerals, criticized it as overly generous to the tribes.[19] Others, who subscribed to the views of Attorney General Stone, objected on the theory that it accorded the states a benefit greater than they would have received merely from the power to tax the lessees.[20] Still others deemed the

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[19] *See, e.g.*, H.R. Rep. No. 763, 69th Cong., 1st Sess. 13 (1926) (minority views of Representatives Sproul, Hudson and Knutson) ("There would not seem to be any equity or fairness on the part of the Great White Father to lavishly give to his wards who already have plenty . . . .").

[20] *See, e.g.*, H.R. Rep. No. 763, *supra*, at 14-19 (minority views of Representative Frear). According to Representative Frear, at the time the bill was being debated in Congress, state royalty tax rates on the production of oil and gas averaged three percent of value. *Id.* at 17.

States' advocates argued, on the other hand, that the states received little benefit from the proposed royalties since they were required to allocate all of their portions to the construction and maintenance of roads and schools on the reservations. *See* H.R. Rep. No. 763, *supra*, at 4 (The "practical effect" of the division of

proposal inequitable to applicants for permits.[21]

The bill finally enacted was a carefully crafted compromise designed to satisfy all parties.[22] Thus, §§ 1 and 2 of the Act (25 U.S.C. §§ 398a-b (1976)) authorized the leasing of Executive Order reservation lands with royal-

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royalties originally proposed "was to require the expenditure of all the income from oil and gas leases either directly or indirectly for the benefit of the Indians," and for that reason the proposal to divide the royalties was ultimately abandoned.).

[21] President Coolidge vetoed the first version of the bill because, in his view, it provided an unwarranted benefit to permit holders without according a similar advantage to applicants for permits. *See* S. Doc. No. 156, 69th Cong., 1st Sess. 1-2 (1926).

[22] *See, e.g.*, H.R. Rep. No. 1791, *supra*, at 3, 6; S. Rep. No. 1240, 69th Cong., 2d Sess. 3, 5 (1927); 67 Cong. Rec. 10915, 10919 (1926) (remarks of Senator Bratton) (indicating that the proposed legislation would give all the royalties to the tribes and would give the states the power to tax in lieu of a share of the royalties); S. Rep. No. 768, 69th Cong., 1st Sess. 6 (1926) ("It has been deemed advisable to pay all the royalty income to the credit of the Indians and to permit the State to levy taxes on the entire production within its borders the same as upon unrestricted lands."); H.R. Rep. No. 763, *supra*, at 9; 66 Cong. Rec. 5433 (1925) (remarks of Congressman Hayden) ("Each House had previously agreed that a share of the benefit to come from the development of oil, gas and other minerals on unallotted Indian lands within Executive order Indian reservations should go to the State. Whether the State should have the right to directly collect a tax or whether a share of the rental or royalty should be paid in lieu of the tax was the issue. . . .").

S. Rep. No. 768, *supra*, at 4 stated:

> The enactment of this legislation will accomplish the following purposes:
>
> 1. Permit the exploration of oil and gas on Executive-order Indian reservations.
> 2. Give the Indian tribes all the oil and gas royalties.
> 3. Authorize the States to tax production of oil and gas on such reservations.

See also H.R. Rep. No. 763, *supra*, at 3; S. Rep. No. 1240, *supra*, at 3; H.R. Rep. No. 1791, *supra*, at 3.

ties to be paid to the benefit of the Indians, while § 3 (25 U.S.C. § 398c (1976)) granted to the states power to tax "the entire output of oil and gas" [23] including the "share obtained for the Indians as bonuses, rentals, and royalties." Section 5 (25 U.S.C. § 398e (1976)) provided for the protection of prior permittees and applicants.

In short, Congress balanced the conflicting claims by expressly granting to the tribes the exclusive royalty interest and by granting to the states—not the tribes—exclusive power to tax the entire output of oil and gas on Executive Order reservations. This division was explained as being in accordance with a consistent congressional policy giving the states the power to tax mineral production from the public domain [24] as well as from various kinds of Indian reservations, whether established by treaty or otherwise.[25]

The Tenth Circuit opined that in passing the 1927 Act, Congress "simply did not think of the issue" of tribal taxation, but concluded that if it had, such taxation would have been permitted because the "majority . . . obviously thought that all benefits from the minerals on the reservations belonged to the Indians." (J.A. 158). This conclusion flies in the face of the statute and the legislative history.

If Congress had wanted to vest taxing power in both the tribes and the states, it could easily have done so.[26] Instead, it enacted only one taxing provision, explicitly according that power to the states (25 U.S.C. § 398c (1976)). The absence of a corollary provision on behalf

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[23] H.R. Rep. No. 1791, *supra*, at 4.

[24] *E.g.* Mineral Leasing Act of 1920, *supra*, 30 U.S.C. § 189.

[25] *See* H.R. Rep. No. 763, *supra*, at 5; S. Rep. No. 768, *supra*, at 6; S. Rep. No. 1240, *supra*, at 3. Examples of such legislation giving the states power to tax Indian lands are: 25 U.S.C. §§ 398, 399, 401, 501 (1976); 41 Stat. 1249-50 (1921).

[26] *Cf.* 25 U.S.C. §§ 319, 321 (1976).

of the tribes speaks for itself. Moreover, Congress' silence on this possibility in the debates and reports is equally persuasive.[27] Finally, the tribes' failure to enact production taxes until nearly half a century after passage of the 1927 Act emphasizes the universal understanding, contemporaneous with the congressional enactment, that the 1927 Act did not authorize or permit tribal severance taxes.[28]

The Tenth Circuit's hindsight conjecture as to how the Congress "might have voted" in 1927 had it actually considered the question of tribal taxation (J.A. 158) is a tacit admission that Congress did *not* intend the tribes to tax. Such conjecture cannot reliably inform statutory construction, and should not serve to overcome the plain intent of Congress or to undo the careful bal-

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[27] During the four years of extensive legislative activity that led to the 1927 Act, it was apparently not once suggested by any of those debating the moral and legal rights and interests of Executive Order tribes with respect to minerals underlying their reservations that such tribes would not only receive the royalties but also have power to tax non-Indian lessees for the same output the states were expressly authorized to tax. *See* S. 876, 68th Cong., 1st Sess. (1924); 66 Cong. Rec. 998-99 (1924); 66 Cong. Rec. 2233-34, 5432-34 (1925); H.R. Rep. No. 1254, 68th Cong., 2d Sess. (1925); H.R. Rep. No. 763, *supra*; S. Rep. No. 768, *supra*; 67 Cong. Rec. 10912-25, 11379-90, 11528-30, 12641 (1926); H.R. Rep. No. 1791, *supra*; S. Rep. No. 1240, *supra*; 68 Cong. Rec. 4569-81 (1927).

[28] Although New Mexico has been taxing oil and gas production since 1937, the Jicarilla Severance Tax Ordinance was not enacted until 1976. Tribal attempts to tax mineral production are of very recent origin, *see* n.12, p. 13, *supra*. The Final Report of the American Indian Policy Review Commission (hereinafter "AIPRC Final Report") acknowledges that as of the date of the Report (1977), Indian Tribes usually received royalties but not taxes from mineral production. 1 AIPRC Final Report 344. The Report recommended tribal enactment of such taxes, and repeal of 25 U.S.C. §§ 398 and 398a (1976) in order to permit tribal taxation. 1 AIPRC Final Report 174, 181, 347.

ance of interests struck by the Act.[29] Indeed, the court's conjecture is blatantly inconsistent with congressional action on these matters since 1919.

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[29] The Tenth Circuit also mentioned but did not adopt (J.A. 158) the Tribe's argument that the General Leasing Act of 1938, 25 U.S.C. §§ 396a-f (1976) (App. 9a-12a), repealed the 1927 Act and thus ended the power of the states to tax mineral wealth on Indian lands.

This position is utterly without basis. The 1938 Act does not address taxation and does not repeal any specified statutes. The brief legislative history of the 1938 Act shows no controversy or debate and contains no indication that the Act would deprive the states of their right to tax production on Indian lands. *See* S. Rep. No. 985, 75th Cong., 1st Sess. (1937); H.R. Rep. No. 1872, 75th Cong., 3d Sess. (1938); 81 Cong. Rec. 8399 (1937); 83 Cong. Rec. 6057-58 (1938). It is most unlikely that Congress, after spending more than a year hammering out a significant compromise in the 1927 Act, would allow its work to dissolve in silence in 1938. Moreover, it is startling that the tribes would have waited four decades before attempting to vindicate rights which they now claim.

The Tribe's position is further undermined by the established canon that repeals by implication are not favored. *See, e.g., Morton* v. *Mancari*, 417 U.S. 535, 549 (1974). That rule is particularly applicable to situations such as this, in which it is claimed that a "narrow, precise and specific" statute is impliedly repealed by a broader, more general enactment. *See Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

B. The Jicarilla tax is preempted because it is "inconsistent with the overriding interests of the National Government."

The Tribal severance tax is also barred because it would conflict with three overriding national interests.

First, at the very least the 1927 Act evidences a continuing congressional policy of placing the taxing power in these situations in the states. There has been no deviation from this policy since Congress as early as 1919 enacted legislation authorizing the states to tax production on Indian lands. The concurrent exercise of taxing power by the tribes of necessity would adversely affect the states' power to tax. A tribal tax would affect the economics of production, rendering existing marginal wells less likely to continue producing in paying quantities, and retarding development of marginally economic prospective wells. Indian severance taxes will affect the rate of production against which the state taxes are measured, and require the states to reduce taxes or forego prospective increases[30] in pursuing state policies of maximizing tax revenues from mineral production without discouraging needed production.[31] The additional burden of tribal taxes would hamper the states' capacity to exercise their congressionally-granted power of taxation of oil and gas production from reservation lands.[32]

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[30] New Mexico imposes several taxes on oil and gas production from all lands within the state. *See* n.2, p. 3, *supra*. In recent years, New Mexico has frequently adjusted its oil and gas severance tax rate, closely following the economics of the industry. *See* 1974 N.M. Laws, Ch. 40; 1977 N.M. Laws, Ch. 102; 1980 N.M. Laws, Ch. 62.

[31] *See* Jones, *The Struggle for Equitable Taxation of Mines—The New Mexico Example*, 16 Rocky Mtn. Min. L. Inst. 463, 478 (1971).

[32] The amicus briefs filed in this Court on behalf of western states forcefully demonstrate that Indian severance taxes cannot co-exist with the taxes states have historically levied upon oil and gas production, including the taxes specifically authorized by the 1927 Act.

Second, the Jicarilla tax undermines the long-standing congressional policy favoring leasing and development of oil and gas reserves on Indian lands pursuant to uniform federal standards. The 1927 Act is only a small part of the fabric of federal laws concerning production of oil and gas from Indian lands. 25 U.S.C. § 396a-f (1976), enacted in 1938 (App. 9a-12a), regulates the entire process of leasing reservation lands for oil and gas mining purposes. Petitioners' leases (on printed forms prescribed by the Secretary, 25 C.F.R. § 171.30 (1980)) and attached "Special Stipulations" and "Forest and Land Protection Stipulations" mandate federal inspection, supervision, and approval of daily activities of lessees by the United States Geological Survey (U.S.G.S.) Oil and Gas Supervisor and the Bureau of Indian Affairs (BIA) Superintendent. 25 U.S.C. § 396d (1976) provides that "[a]ll operations of lessees of restricted Indian lands are subject to rules and regulations promulgated by the Secretary of the Interior."

The regulations specifically applicable to Indian oil and gas leases are comprehensive. They cover many aspects of the leasing process and lease operations, including advertising, Secretarial approval, bonds, acreage limitations, unitization, rental and royalty payments, and other areas of federal supervision and discretion. *See* 25 C.F.R. §§ 171.1 to 171.30 (1980). They also require the lessee to comply with the U.S.G.S. "Oil and Gas Operating Regulations." Those regulations, 30 C.F.R. pt. 221 (1979), embrace 67 separate regulations imposing additional production and conservation requirements upon lessees, committing numerous determinations to Secretarial discretion, and requiring considerable day-to-day federal inspection and supervision. Oil and gas lessees on Indian lands are also subject to numerous additional federal regulations governing activities incident to exploration and production operations and prescribing a myriad

of conservation and environmentally protective measures.[33]

Every aspect of leasing, exploring for, developing, and producing oil and gas from the Jicarilla Apache Reservation is subject to intensive, detailed, and day-to-day regulation, inspection, and supervision by the U.S.G.S., the BIA, and other federal agencies. This regulation is at least as pervasive, if not more so, than that involved in *White Mountain Apache Tribe* v. *Bracker*, —— U.S. ——, 100 S. Ct. 2578 (1980). *See also Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965). The Indian severance tax places additional burdens upon lessees and affects their ability to comply with the numerous requirements imposed by federal law. Perhaps even more importantly, the Tribe and the Secretary urge that the purpose of the tax is regulatory as well as economic.[34] The additional burdens imposed by the tax will

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[33] *See* 25 C.F.R. §§ 161.1-.20 (1980) (rights-of-way); 25 U.S.C. § 321 (1976), 25 C.F.R. § 161.25 (1980) (pipelines); 25 C.F.R. §§ 162.1-.19 (1980) (BIA roads). *See also* Safe Drinking Water Act, 42 U.S.C. §§ 300f through 300j-9 (1976), *as amended by* the Safe Drinking Water Amendments of 1977, Pub. L. No. 95-190, 91 Stat. 1393, *and by* Act of September 6, 1979, Pub. L. No. 96-63, 93 Stat. 411; 40 C.F.R. pt. 146, especially 40 C.F.R. §§ 146.5(b), 146.21-.25 (1980); 33 U.S.C. § 1342 (1976 & Supp. III 1979); 40 C.F.R. §§ 122.1-.60 (1980) (NPDES); 33 U.S.C. § 1311 (1976), 40 C.F.R. §§ 435.32, 435.50-.52 (effluent discharges). Even the price of natural gas, oil, or hydrocarbons produced on the Indian leases is subject to federal regulation. Natural Gas Policy Act of 1978. 15 U.S.C. §§ 3301-3432 (Supp. III 1979); Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-56 (1976), *as amended by* Act of December 5, 1974, Pub. L. No. 93-511, 88 Stat. 1608 *and by* Emergency Petroleum Allocation Act of 1975, Pub. L. No. 94-99, 89 Stat. 471 *and by* Act of December 22, 1975, Pub. L. No. 94-163, 89 Stat. 941-55.

[34] *See* Brief in Chief of Secretary of the Interior in the Tenth Circuit at 22-23, 27, arguing that the "sovereign" right to tax is

"disturb and disarrange" the pervasive federal regulatory scheme, and the Jicarilla severance tax should be preempted just as the state taxes were in *White Mountain Apache Tribe* v. *Bracker*, and *Warren Trading Post Co.* v. *Arizona Tax Commission, supra.*[35]

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necessary to "restrict depletion" of the Tribe's mineral resources and to protect those resources from state and corporate "encroachment." *See also* 1 AIPRC Final Report 179. The Preamble to the Jicarilla Tax Ordinance recites that the Tribe has the obligation to develop its resources on "sustained yield principles" for the general welfare of the Tribe as a whole (App. 12a). In its opposition to the petitions for certiorari the Tribe argues that it has had to take action to protect its rights under mineral leases and protect the environment of its reservation "from irresponsible and unnecessary degradation" (p. 7), that its tribal resources cannot be equated to "publicly owned property" (p. 9), and that:

> approval by this Court of the tribal power to impose severance taxes on non-Indians will subject Petitioners' exploitation of mineral resources on tribal lands to reasonable regulation and taxation by the Jicarilla Apache Tribe. . . . (p. 32).

[35] The Tenth Circuit dismissed the effect of the federal regulatory scheme on the basis of 25 U.S.C. § 396b (1976), which provides that the right of tribes organized under the Indian Reorganization Act to lease lands for mining purposes "as therein provided" should not be restricted by the General Leasing Act of 1938. The court concluded that inasmuch as Congress had allowed IRA tribes "to assume and define for themselves the leasing process," Congress had not "intended to so occupy the field of regulating leasing of tribal property for oil and gas leases that the tribes could not impose additional burdens on lessees through exercise of the power of taxation." J.A. 159-61. The Tenth Circuit misconstrued these statutes. The Indians may not "define for themselves the leasing process." The leases involved here were not issued pursuant to the authority reserved to the Tribe in 25 U.S.C. § 477 (1976), but were issued pursuant to the pervasive federal regulatory scheme. Any lease for a term of longer than ten years (the maximum permitted by the IRA provision), or any sale of an interest in tribal lands, must be approved by the Secretary of the Interior and cannot be effected by an IRA tribe alone. 25 U.S.C. § 477 (1976). An IRA tribe desiring to take advantage of 25 U.S.C. § 396b (1976) and 25 U.S.C. § 477 (1976) must specify the procedures for leasing in its constitution or charter, and the consti-

Finally, the Jicarilla tax undermines the national interests in promoting the development of domestic oil and gas resources and curbing inflationary energy costs.[36] The Jicarilla tax significantly impacts the economics of production, rendering existing marginal wells less likely to continue producing and retarding development of marginally economic prospective wells. Even if the tax is passed on in its entirety, the additional tax must be

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tution or charter must be approved by the Secretary. *See* 60 I.D. 331 (1949). The regulations adopted by the Secretary provide that they are applicable to any lease, even one issued by an IRA tribe pursuant to 25 U.S.C. § 477 (1976), if the validity of the lease depends upon the approval of the Secretary. 25 C.F.R. § 171.29 (1980). Thus, even if the Tribe sought to avail itself of the authority of the IRA provision, substantial and pervasive federal controls would still exist, and continue to foreclose an inconsistent and disruptive Tribal tax.

[36] President Carter said in his State of the Union Address, January 23, 1980, 126 Cong. Rec. H168 (daily ed. Jan. 23, 1980):

> "Our excessive dependence on foreign oil is a clear and present danger to our nation's security.
>
> The need has never been more urgent.
>
> * * * *
>
> The single biggest factor in the inflation rate last year . . . was from one cause, the skyrocketing prices of OPEC oil. We must take whatever actions are necessary to reduce our dependence on foreign oil—and at the same time reduce inflation.

These national interests are also reflected in legislation. Energy Supply and Environmental Coordination Act of 1974. 15 U.S.C. §§ 791, *et seq.* (1976); Natural Gas Policy Act, 15 U.S.C. §§ 3301 *et seq.* (Supp. III 1979). *See also* 30 U.S.C. § 21a (1976), adopted in 1970:

> The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, [and] (2) the orderly and economic development of domestic mineral resources . . . .
>
> For the purpose of this section "minerals" shall include all minerals and mineral fuels including oil, gas, coal, oil shale and uranium. . . .

absorbed by the consumers and will inevitably result in increasing energy costs.[37] Moreover, the severance tax will hamper production in yet another, more significant respect. The proponents of Indian taxation have argued that the new taxes are a "sovereign tool" necessary to enable the tribes to control the rate of extraction of natural resources.[38] Apart from the impact of Indian regulation of oil and gas development on existing federal regulatory policies,[39] the nation can ill afford to permit the councils of those tribes having minerals under lease—among the 287 Indian tribes in this country—[40] to frustrate national objectives by restricting at will the production of vital resources.

III. THE TRIBAL TAX VIOLATES THE COMMERCE CLAUSE BY PROVIDING A DISCRIMINATORY BENEFIT TO LOCAL INDUSTRY AND IMPOSING A MULTIPLE BURDEN UPON NATIONAL COMMERCE.

The Tenth Circuit's conclusion that the Jicarilla Tribal tax neither discriminates against nor burdens the free flow of interstate commerce rests on a misreading of the

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[37] The Jicarilla tax is 5 cents per million BTU of gas and 29 cents per barrel of oil (App. 14a). When it is added to the New Mexico taxes, the combined tax burden amounts to 29 percent of the interstate price of old gas and over 12.5 percent of the price of old oil. The tax will yield over $2,000,000 annually to the Tribe. (J.A. 130, 143).

The District Court found that producers would have the right under their contractual provisions to pass most of the burden of the Tribe's tax onto their consumers—which would inevitably increase the prices paid by those consumers—but that if the producers were required to absorb the tax it would substantially limit their ability to operate profitably some of the existing wells, requiring them to shut down such wells (J.A. 130).

[38] *See* n.34, p. 26, *supra.*

[39] *See* discussion at pp. 25-27, *supra.*

[40] *Santa Clara Pueblo* v. *Martinez, supra,* 436 U.S. at 65, n. 21.

express language of the Tribe's Ordinance, a disregard for the underlying purpose of the Interstate Commerce Clause as articulated by this Court, and a misapplication of the Tenth Circuit's own test under the Indian Commerce Clause. The decision below encourages all tribes to establish protected industries on their reservations, subsidized by discriminatory taxes, and without regard to their detrimental effects upon commerce throughout the rest of the nation. If it should stand, that decision will foster the balkanization of commerce that this Court has consistently opposed whenever states and municipalities have sought to enact measures to protect local industries at the expense of the rest of the nation. The Jicarilla tax is discriminatory on its face, is imposed upon an activity integrally related to interstate commerce, and creates a multiple burden upon national commerce.

A. The Commerce Clause of its own force restrains the Tribe from impeding the free flow of national commerce.

Article I, Section 8 of the Constitution empowers the Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Decisions of this Court have long recognized that the Commerce Clause of its own force restrains the states from interrupting, burdening, or discriminating against the free flow of interstate commerce. *See, e.g., Gibbons* v. *Ogden*, 22 U.S. (6 Wheat.) 1, 88 (1824); *Cooley* v. *Board of Wardens*, 12 U.S. (1 How.) 299 (1852). *See also, Boston Stock Exchange* v. *State Tax Commission*, *supra*, 429 U.S. at 328; *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-71 (1976); *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946).

Although the states have a "residuum of power" to make laws governing local events, the Commerce Clause embodies an "overriding requirement of a national 'com-

mon market' . . . ." *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 350 (1977). Its "very purpose . . . was to create an area of free trade among the several States." *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944). In order to effectuate this overriding national purpose, the Commerce Clause has been read to restrain states from impeding the flow of commerce between the United States and foreign nations; between the federal government and the Indian tribes lying within the jurisdictional borders of the state itself; and with, among, or between one or more other states or parts thereof. Moreover, even though they are not explicitly mentioned in the Commerce Clause, political subdivisions within a state are likewise restrained from hampering the flow of commerce in any of the aforementioned ways. *See Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951). Indeed, the only entities within the nation whose actions, as they affect interstate commerce, have not yet been expressly held subject to the restrictions of the Commerce Clause are the Indian tribes.

The reasons for this omission are rooted in history. At first regarded as akin to foreign nations, existing beyond the western borders of the states, *see Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 556 (1832), the tribes have generally been left free to govern their internal affairs without observing those constraints framed specifically as limitations on federal or state authority. *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 56. The one constitutional provision that does unmistakably apply to the tribes is the Commerce Clause. In the past, however, that clause has been used solely as a vehicle for protective legislation to shield the tribes from the lawlessness of the frontier. *See, e.g., Oliphant* v. *Suquamish Indian Tribe*, *supra*, 435 U.S. at 201; *cf. United States* v. *Mazurie*, 419 U.S. 544, 554 (1975). The extent to which the Commerce Clause restricts the activities of the tribes is a question not yet directly addressed by this Court.

Nonetheless, past decisions concerning other areas of Indian affairs clearly suggest that tribes, in the same manner as states, must be restrained by the operation of the Commerce Clause. The unmistakable movement gradually to incorporate American Indians into the mainstream of the nation's political, economic and social life has been amply documented in the decisions of this Court.[41] As the Court has noted, with the passage of time and in numerous ways "the United States [has] beg[un] to consider the Indians less as foreign nations and more as a part of our country." *Organized Village of Kake* v. *Egan, supra*, 369 U.S. at 72. Today, Congress "follow[s] a policy calculated eventually to make all Indians full-fledged participants in American society." *Williams* v. *Lee, supra*, 358 U.S. at 220. Thus, it is only appropriate that when tribes engage in conduct directly and substantially affecting the flow of commerce beyond their jurisdictional borders, their actions should be subject to the same constitutional constraints applicable to all other entities.

The Court of Appeals accepted the principle that "the Commerce Clause . . . of its own force limits the power of the tribes as well as the states" (J.A. 152), but misapplied it, as we now discuss.

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[41] More than a century ago Congress abandoned the fiction that tribes, as foreign nations, must be dealt with by treaty. *Compare Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565-66 (1903), *with Worcester* v. *Georgia, supra*, 31 U.S. (6 Pet.) at 556. *See* 16 Stat. 566 (1871). In a host of areas the scope of tribal authority has been constricted and tribal members have been rendered subject to the regulatory powers of the state. *See Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-49 (1973); *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962); *Warren Trading Post Co.* v. *Arizona Tax Comm'n, supra*, 380 U.S. at 687 n.3 (1965); *Williams* v. *Lee*, 358 U.S. 217, 219-20 (1959); 28 U.S.C. § 1360 (1976) (granting to specified states "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . .").

B. The Jicarilla tax discriminates against interstate and Indian commerce.

The Tenth Circuit misconstrued the Tribe's Ordinance and the decisions of this Court in holding that the Jicarilla tax does not discriminate against interstate commerce and Indian commerce. By its terms, the Ordinance taxes only oil and gas that is "severed, saved and removed from Tribal lands" and is "sold or transported off the Reservation" (App. 14a). These phrases are not "ambiguous" nor do they have the meaning ascribed to them by the Court of Appeals as taxing production removed "from the soil" and "that is sold *on* the reservation or transported off the reservation before sale" (J.A. 155) (emphasis added). Had the Tribe intended this meaning, surely they would have chosen different language. The manifest intent of the Ordinance is to tax oil and gas which is "removed from" the Reservation, *i.e.*, sold off the Reservation or transported off the Reservation.[42] In plain language, the Ordinance exempts from taxation oil and gas sold *on* the Reservation; kept *on* the Reservation for use in industry or agriculture; or taken by the Tribe *on* the Reservation as in-kind royalty.[43]

By discriminating between products taken off the Reservation and those utilized on it, the Jicarilla tax on its face violates the Commerce Clause. This Court has

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[42] The Tenth Circuit's reading of the Ordinance strains credulity. Not only does it render the Ordinance's language unnecessarily redundant (since to "sever" means to "remove from the soil"), but it also ignores the geographical progression embodied in the language: the minerals are first brought out of the ground ("severed"); moved to storage on the surface ("saved"); then shipped off the Reservation ("removed"). The conjunction chosen by the drafters of the Ordinance ("and") means that only minerals exposed to all three stages of the geographical progression are subject to the tax.

[43] The Ordinance specifically provides an exemption for "royalty gas, oil or condensate taken by the Tribe in kind . . . ." (App. 14a).

repeatedly condemned such discrimination favoring local enterprises when the commerce involved is "among the several States." *See Boston Stock Exchange* v. *State Tax Commission, supra,* 429 U.S. at 329, and cases cited therein. Moreover, local legislative action with the purpose and effect of fostering " 'simple economic protectionism' " is subject to " 'a virtually *per se* rule of invalidity' " if it substantially impedes interstate commerce. *Lewis* v. *BT Investment Managers, Inc.*, —— U.S. ——, 100 S. Ct. 2009, 2015 (1980), *quoting City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978).

The facts of this case amply illustrate why the same framework of analysis used by the Court in Interstate Commerce cases should be equally applicable to cases under the Indian Commerce Clause. The Tenth Circuit's decision permits the Tribe to market oil and gas under a two-tiered pricing system, with one price for customers beyond its borders, and one for those on the Reservation. From the Tribe's perspective, tax discrimination has both immediate and long-term benefits. It permits the collection of substantial revenues without raising the price of oil and gas consumed on the Reservation; it allows the Tribe to resell its royalty share of production on the Reservation without incurring tax liability; and it fosters the development of subsidized industries on the Reservation.[44]

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[44] Any refiner located on the Reservation would enjoy a competitive advantage over Petitioners and Petitioners' customers due solely to the existence of the discriminatory tax. The possibility that refineries or processing facilities would relocate on the Reservation is not mere speculation. The Tribe has announced its intentions to use royalty gas for industry and for agriculture and to enter into the natural gas production and marketing business. Tr. at 257, 271; *Jicarilla Apache Tribe* v. *FERC*, 578 F.2d 289, 290 (10th Cir. 1978); Plaintiff's Amended Proposed Findings of Fact and Conclusions of Law, Proposed Finding No. 78, in *Jicarilla Apache Tribe* v. *Southern Union Gas Co.*, D.N.M. No. CV-75-247M.

The majority of the court below failed to perceive the inherent dangers of the Tribal taxing scheme. After observing that the Indians were not presently involved in the production of oil or gas, the Court concluded that it would be "fruitless and wasteful" to require the Tribe to tax its own receipt of in-kind royalty (App. 154). This assertion simply misses the point. It ignores the substantial possibilities that the Tribe would sell its own tax-free royalty portion *on* the Reservation to third-party producers or distributors for ultimate resale, either before or after processing, off the Reservation; or would develop its own production and processing facilities further to capitalize upon its tax-free oil and gas; or would induce major petroleum processors to relocate on the Reservation solely to escape the discriminatory tax burden imposed by the Tribe upon processors, such as the Petitioners, located off the Reservation.[45]

The Jicarilla Ordinance adds a new twist to the taxing scheme invalidated by the Court in *Colville, supra.* Instead of marketing on the Reservation a tax exemption derived from state law, as the *Colville* tribes sought to do, the Jicarillas have foisted a tax on those who live outside the Reservation, and created their own exemption from it, which they then may seek to market on the Reservation. The result, however, is the same as the one condemned in *Colville:* the establishment of a tax-free enclave on the Reservation at the expense of the surrounding areas.

The harm flowing from the Jicarilla tax is much greater than that feared by the Court in *Colville.* First, the locus of injury is much wider here than it was in *Colville.* The sale of tax-exempt cigarettes on the reser-

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[45] Under any of these scenarios, the discriminatory tax will benefit those who purchase directly from the Tribe on the Reservation while injuring those, like Petitioners, whose production, marketing and refining operations straddle state and tribal boundaries. Judge Barrett made precisely this point in dissent (J.A. 196).

vation to non-tribal members injured only those merchants competing in the immediate vicinity. On the other hand, a discriminatory tax on the production of oil and gas shipped directly into interstate commerce affects customers throughout the nation. Second, the Jicarilla tax thwarts the federal goal of developing indigenous sources of energy. At a time when the country seeks to reduce dependence upon foreign oil, restraints upon the production, distribution and nationwide sale of petroleum products severely implicate vital national interests.

Finally, the Jicarilla tax is unrestrained by the economic and political pressures that normally serve to curb a sovereign's taxing power. As this Court noted in *Colville*, a tribe which taxes the merchandise it markets will have an economic incentive to maintain its tax at reasonable levels. An excessive tax will discourage sales, even to those living near outlets on the Reservation. Moreover, where the tribal members are themselves subjected to the tax (as they were in *Colville*), they may use their political influence on the Tribal government to discourage taxation at excessive levels. Neither of these factors restrains the Jicarilla tax. The higher its level, the more benefit accrues, without any corresponding detriment, to the Tribe. Because the producing companies have already agreed to long-term leases, and made substantial capital investments on the Reservation, they would not abandon their operations, until the tax becomes prohibitive. In addition, the fact that the Tribe has exempted itself from the tax burden which befalls the rest of the consuming public located outside the Reservation makes internal opposition by Tribe members to tax increases unlikely. The Petitioners, like the class of consumers to whom they sell oil and gas from the Reservation, have no recourse to the Tribe's political processes. Thus the tax, unrestrained by normal economic and political pressures, could severly impact interstate commerce.

C. The Tribal Ordinance violates the Commerce Clause because it taxes an activity which is an integral part of the flow of commerce.

The Court's conclusion that the Jicarilla tax was not "levied on the privilege of engaging in interstate commerce itself" (J.A. 154) rests on the flawed premise, already discussed, that the taxable event is the "local activity" of severance. Although labelled a severance tax, with payment said to "be due at the time of severance," the Jicarilla Ordinance in fact applies only to the shipment of goods *off* the Reservation, not the act of severance *on* the Reservation.[46] Thus, the tax is imposed only after the last of three conditions has been fulfilled: the oil or gas must have been "severed, saved *and removed from* Tribal lands." At that point, when the tax becomes applicable, the oil or gas is already in transit beyond the Reservation's borders.

It is settled that a sovereign state may not tax goods in interstate commerce if it "has delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun." *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, supra,* 347 U.S. at 167. Notwithstanding its appellation, the Jicarilla tax, as the one invalidated in *Michigan-Wisconsin Pipe Line Co., supra,* is "not levied on the capture or production of the gas, but rather on its taking into interstate commerce *after* production, gathering and processing." *Id.* at 169 (emphasis in original). Because the tax is imposed upon an activity integral to and inseparable from the flow of interstate commerce, it cannot stand.

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[46] The validity of a tax must be judged by its effects, potential and actual, upon commerce, rather than by its label. *See Michigan-Wisconsin Pipe Line Co.* v. *Calvert, supra,* 347 U.S. at 164. *See also Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 279 (1977); *Gwin, White & Prince Inc.* v. *Henneford,* 305 U.S. 434, 439 (1939).

The tax is invalid under this Court's decision in *Michigan-Wisconsin Pipe Line Co.* regardless of whether the Reservation's border with New Mexico is treated as the equivalent of a state line. An overwhelming portion of the oil and gas taken by Petitioners and subject to the Jicarilla tax flows from the Reservation directly into interstate commerce; the tribal tax levied upon its shipment substantially impedes that flow.[47] Just as a political subdivision within a state may not impose discriminatory restrictions upon interstate trade,[48] so too, the Tribe, if it is a taxing entity within the confines of New Mexico, may not impede interstate commerce. Its Ordinance must fail regardless of its impact upon commerce within New Mexico. Moreover, the Tribe's tax is invalid under *Michigan-Wisconsin Pipe Line Co.*, whether or not any other taxing jurisdiction has actually imposed a similar tax upon the same activity. It is enough to engage the Commerce Clause that the tax was levied upon an activity integral to the flow of interstate commerce—the shipment of goods across tribal and state lines—and that it produced a substantial adverse impact upon interstate commerce.

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[47] The trial court found and the Tenth Circuit accepted for purposes of the appeal that imposition of the Jicarilla tax substantially affected interstate commerce in several ways. If upheld, the tax will: (1) apply to all of that portion, comprising approximately 80% of the Reservation's output, of petroleum products shipped from the Reservation to destinations outside of New Mexico; (2) raise the interstate price of old gas by 29%, and of old oil by 12.5%, when added to the New Mexico taxes; (3) net tax payments of approximately two million dollars annually, a cost which would be passed on to the ultimate consumers; and (4) result in the abandonment by the Petitioners of certain existing wells on the Reservation. (J.A. 129-30, 143).

[48] *See, e.g., Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 at n.4 (1951); *West Point Wholesale Grocery Co.* v. *City of Opelika*, 354 U.S. 390 (1957).

D. The Tribe's oil and gas severance tax imposes a multiple burden on interstate commerce in that the State of New Mexico taxes the same activity at full value.

Even if the Tribe were to amend its taxing Ordinance to remove the defects noted above, and enacted in its place a non-discriminatory tax whose incidence truly fell upon severance, the new tax would still be improper. *Any* Tribal severance tax additive to New Mexico's taxes on the same activity will create a multiple burden upon commerce and thereby violate the Commerce Clause.

In order to satisfy the requirements of the Commerce Clause, a state tax upon local activities related to interstate commerce must be "applied to an activity with a substantial nexus with the taxing State, [be] fairly apportioned, . . . not discriminate against interstate commerce and [be] fairly related to the services provided by the State." *Complete Auto Transit, Inc.* v. *Brady, supra,* 430 U.S. at 279. *See also Exxon Corp.* v. *Wisconsin Department of Revenue,* —— U.S. ——, 100 S. Ct. 2109, 2122 (1980); *Mobil Oil Corp.* v. *Commissioner of Taxes,* —— U.S. ——, 100 S. Ct. 1223, 1234 (1980).

This Court has often held that state tax statutes not apportioned on their face to the value of activities carried on within the taxing state cause the risk of multiple taxation, in that local activities related to interstate commerce may be subjected to a "multiple burden" of taxation to which purely local commerce is not exposed.[49] Once again, these same principles, applicable to

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[49] *See, e.g., Department of Revenue* v. *Association of Washington Stevedoring Cos.,* 435 U.S. 734, 750 (1978); *Standard Pressed Steel Co.* v. *Department of Revenue,* 419 U.S. 560, 563-64 (1975); *J.D. Adams Mfg. Co.* v. *Storen,* 304 U.S. 307, 311 (1938); *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250, 255-56, 260 (1938); *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.,* 303 U.S. 604, 612-13 (1938).

states, should be extended to restrain the Tribe under the Commerce Clause.

The Tenth Circuit misapplied the Commerce Clause and this Court's decision in *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938), and thereby rendered the doctrine of multiple burden inapplicable to cases involving tribal industry on the Reservation. In *Western Live Stock* the Court, referring solely to the interstate portion of the Commerce Clause, stated that the vice characteristic of those local taxes which have been held impermissibly to burden interstate commerce is that they are "of such a nature as to be capable, in point of substance, of being imposed—or added to—with equal right by *every state* which the commerce touches. . . ." *Id.* at 255-56 (emphasis added). Relying on a crabbed reading of this language, the court below concluded that since only one "state"—New Mexico—could tax the local event of severance, there is no possibility of multiple taxation.[50] This conclusion, though consistent with the Court's literal language, fails to recognize the unique burden created by a tribal tax and ignores the Commerce Clause's underlying purpose of creating a uniform, national "common market" free of trade restraints.

Although only one "state" is involved, two "sovereigns" have asserted taxing power over the minerals in the Reservation. Unlike two geographically separate states, both taxing jurisdictions here are independent but geographically concentric. Each can justify[51] its tax by claiming the required special relationship, or nexus, with the taxed

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[50] This conclusion embodies two separate strands of thought: first, that no states other than New Mexico have sufficient relationship to the production of the oil and gas to impose a severance tax; and second, that the Tribe, though a "sovereign," is not a "state."

[51] This argument assumes, of course, that the Tribe has the power to levy this tax and amends its Ordinance in such a way that the taxable event is the severance of oil and gas, not their interstate shipment.

item. Each can claim that its tax falls upon a local activity carried on within the territory of the sovereign, *i.e.*, the severance of the same oil and gas from the same land. Each has assessed the taxed item at "full value," *i.e.*, the full value of the gas and oil at the time of production. Each can claim that its tax is levied only upon the value of that portion of interstate activities falling within its taxing jurisdiction, and thus automatically is "fairly apportioned," and produces no multiple burden upon interstate commerce. The problem, of course, is that although the claims of both jurisdictions may be justified, the result is the imposition of a multiple burden upon the taxpayer.

Although the situation presented when overlapping jurisdictions impose identical taxes upon the same tax event is unique, it has an analogy in the case law. In *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), the Court found that California's *ad valorem* property tax on foreign shipping containers present in the state, though fairly apportioned and accurately assessed, created the risk of a multiple burden upon international commerce and frustrated the achievement of federal uniformity. In order to eliminate the unique risk of multiple burden created when a state and a foreign nation share concurrent power to tax the identical event—a burden that could not be alleviated merely by requiring the state to apportion its tax—the Court required "an inquiry more elaborate than that mandated by *Complete Auto.*" *Id.* at 451. It held that a fairly apportioned, nondiscriminatory state tax on an activity with a substantial nexus to the taxing jurisdiction would nonetheless violate the Commerce Clause if it created a substantial risk of multiple taxation and frustrated the achievement of federal uniformity in an area in which uniformity was necessary.

Because tribes are no longer deemed foreign nations, the Court's approach in *Japan Line, Ltd.* is not disposi-

tive of the case at bar. It does, however, serve to highlight the constitutional flaws of the Jicarilla Ordinance. The Tribe's tax does more than create a "substantial risk" of multiple taxation: it creates the actual burden of double taxation at full value.[52] Moreover, like California's tax on foreign shipping containers, the Jicarilla Ordinance frustrates federal policy in several significant ways. The tax undermines the federal imperative of developing a uniform national energy policy. By virtue of their unbridled taxing power, the Jicarillas can substantially affect the price of interstate oil and gas and can determine whether existing wells will remain producing or prospective wells will be drilled. Furthermore, the tax frustrates the national objective, already described, of guaranteeing the free flow of commerce; it impedes commerce in and out of the Reservation, of New Mexico, and of the several states. It would be ironic, and indeed inexplicable, to find after two centuries of adjudication that the most dependent yet least accountable entities under the Constitution are free to ignore the constitutional restraints that bind states, counties, and municipalities; and that Indian tribes may impose and multiply

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[52] In *Japan Line, Ltd.* the Court noted that a proper apportionment by California would not relieve the taxpayer of the risk of multiple burden, since the taxpayer's home country, Japan, would be free to follow the international custom of assessing an identical property tax on the *full value* of all the taxpayer's cargo containers found throughout the globe. The combined result of the California and Japanese assessments would be taxation at more than full value. Because the Court could not require the Japanese authorities to apportion their tax, it invalidated in entirety the California tax. It did so merely on the basis of the *risk* of multiple burden, without any demonstration of actual multiple burden.

In the instant case it is possible for Congress, acting pursuant to the Supremacy Clause, to apportion the tax benefit between the Tribe and New Mexico and thereby preclude the possibility of multiple burden to the taxpayer. Petitioners contend that Congress already made precisely such an apportionment when it entrusted all power to tax the Reservation's oil and gas production to the state, and all rights to the royalty portion to the Tribe. (*See* pp. 16-23, *supra*).

burdens upon commerce with the rest of the nation. It is respectfully submitted that the Constitution does not permit the Jicarilla Tribe to cause those results, and that the Severance Ordinance violates the Commerce Clause.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Tenth Circuit should be reversed with directions to enter an order affirming the judgment of the District Court for the District of New Mexico.

Respectfully submitted,

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APPENDIX

Constitutional Provision, Treaty, Statutes, Ordinances and Executive Orders Involved

1. Constitutional Provision

United States Constitution, Article I, Section 8, Clause 3:

> The Congress shall have Power . . .
>
> To regulate Commerce . . . among the several States, and with the Indian Tribes; . .

2. Treaty Provisions

Articles 8, 9 and 11, ¶ 1, of the Treaty of Guadalupe Hidalgo Between the United States and Mexico, February 2, 1848, 9 Stat. 922:

> ARTICLE VIII
>
> RIGHTS OF MEXICANS ESTABLISHED IN TERRITORIES CEDED TO UNITED STATES
>
> Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax or charge whatever.
>
> Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without

having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.

ARTICLE IX

HOW MEXICANS REMAINING IN CEDED TERRITORIES MAY BECOME CITIZENS OF THE UNITED STATES

Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

ARTICLE XI

SUPPRESSION OF SAVAGE INDIAN RAIDS INTO MEXICO; PURCHASE OF CAPTIVES OR STOLEN PROPERTY PROHIBITED; RETURN OF CAPTIVES TO MEXICO *

Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the government of the United States whensoever this may be necessary; and that when they cannot be prevented, they shall be punished by the said government, and satisfaction for the same shall be exacted—all in the same way, and with equal diligence and energy, as if the same incursions were meditated or committed within its own territory, against its own citizens.

* * * *

3. Statutes

Act of March 3, 1927, 25 U.S.C. § 398a-e (1976):

§ 398a. Leases of unallotted lands for oil and gas mining purposes within Executive order Indian reservations

Unallotted lands within the limits of any reservation or withdrawal created by Executive order for Indian purposes or for the use or occupancy of any

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* The obligations of the United States under Article XI were released by Article II of the Gadsden Treaty Between the United States and Mexico, December 30, 1853, 10 Stat. 1031.

Indians or tribe may be leased for oil and gas mining purposes in accordance with the provisions contained in section 398 of this title.

(Mar. 3, 1927, ch. 299, § 1, 44 Stat. 1347.)

§ 398b. Proceeds from rentals, royalties, and bonuses; disposition

The proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive order Indian reservations or withdrawals shall be deposited in the Treasury of the United States to the credit of the tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians: *Provided*, That said Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by Act of Congress.

(Mar. 3, 1927, ch. 299, § 2, 44 Stat. 1347.)

§ 398c. Taxes

Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: *Provided*, That such

taxes shall not become a lien or charge of any kind against the land or other property of such Indians.

(Mar. 3, 1927, ch. 299, § 3, 44 Stat. 1347.)

§ 398d. Changes in boundaries of Executive order reservations

Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress.

(Mar. 3, 1927, ch. 299, § 4, 44 Stat. 1347; Oct. 21, 1976, Pub. L. 94-579, title VII, § 704(a), 90 Stat. 2792.)

AMENDMENTS

1976—Pub. L. 94-579 struck out the proviso relating to nonapplicability of provisions to temporary withdrawals by the Secretary of the Interior.

EFFECTIVE DATE OF 1976 AMENDMENT

Section 704(a) of Pub. L. 94-579 provided in part that this section is amended effective on and after Oct. 21, 1976.

SAVINGS PROVISIONS

Amendment by Pub. L. 94-579 not to be construed as terminating any valid lease, permit, patent, etc., existing on Oct. 21, 1976, see Savings Provisions note under section 1701 of Title 43, Public Lands.

§ 398e. Applications for permits to prospect for oil and gas filed under other statutes; disposition

The Secretary of the Interior is authorized, under such rules and regulations as he may prescribe, to allow any person who prior to May 27, 1924, filed an application for a permit in accordance with the provisions of the Act of February 25, 1920, to pros-

pect for oil and gas upon lands within an Indian reservation or withdrawal created by Executive order who shall show to the satisfaction of the Secretary of the Interior that he, or the party with whom he has contracted, has done prior to January 1, 1926, any or all of the following things, to wit, expended money or labor in geologically surveying the lands covered by such application, has built a road for the benefit of such lands, or has drilled or contributed toward the drilling of the geologic structure upon which such lands are located, or who in good faith has either filed a motion for reinstatement or rehearing; or performed any other act which in the judgment of the Secretary of the Interior entitles him to equitable relief, to prospect for a period of two years from March 3, 1927, or for such further time as the Secretary of the Interior may deem reasonable or necessary for the full exploration of the land described in his application under the terms and conditions therein set out, and a substantial contribution toward the drilling of the geologic structure thereon by such applicant for a permit thereon may be considered as prospecting under the provisions hereof; and upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil and gas have been discovered within the limits of the land embraced in any such application, he shall be entitled to a lease for one-fourth of the land embraced in the application: *Provided*, That the applicant shall be granted a lease for as much as one hundred and sixty acres of said lands if there be that number of acres within the application. The area to be selected by the applicant shall be in compact form and, if surveyed, to be described by the legal subdivisions of the public land surveyed; if unsurveyed, to be surveyed by the Government at the expense of the applicant for lease in

accordance with rules and regulations to be prescribed by the Secretary of the Interior, and the lands leased shall be conformed to and taken in accordance with the legal subdivisions of such surveys; deposit made to cover expense of surveys shall be deemed appropriated for that purpose, and any excess deposits may be repaid to the person or persons making such deposit or their legal representatives. Such leases shall be for a term of twenty years upon a royalty of 5 per centum in amount or value of the production and the annual payment in advance of a rental of $1 per acre, the rental paid for any one year to be credited against the royalties as they may accrue for that year, with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior. The applicant shall also be entitled to a preference right to a lease for the remainder of the land in his application at a royalty of not less than 12½ per centum in amount or value of the production, the royalty to be determined by competitive bidding or fixed by such other methods as the Secretary of the Interior may by regulations prescribe: *Provided further*, That the Secretary of the Interior shall have the right to reject any or all bids.

(Mar. 3, 1927, ch. 299, § 5, 44 Stat. 1347.)

Sections 16 and 17 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. §§ 476, 477 (1976):

§ 476. Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult mem-

bers of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(June 18, 1934, ch. 576, § 16, 48 Stat. 987.)

§ 477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided*, That such charter shall not become operative until ratified at a special election by a majority vote of

the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by ness, not inconsistent with law; but no authority Act of Congress.

(June 18, 1934, ch. 576, § 17, 48 Stat. 988.)

Sections 1 through 7 of the General Leasing Act of May 11, 1938, as amended, 25 U.S.C. §§ 396a-f (1976):

§ 396a. Leases of unallotted lands for mining purposes; duration of leases

On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

(May 11, 1938, ch. 198, § 1, 52 Stat. 347.)

Historical Note

Repeals. Section 7 of Act May 11, 1938, provided as follows:

"All [Acts] or parts of Acts inconsistent herewith are hereby repealed."

§ 396b. Public auction of oil and gas leases; requirements

Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: *Provided*, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title.

(May 11, 1938, ch. 198, § 2, 52 Stat. 347.)

§ 396c. Lessees of restricted lands to furnish bonds for performance

On and after May 11, 1938, lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds, in amounts satisfactory to the Secretary of

the Interior, guaranteeing compliance with the terms of their leases: *Provided*, That personal surety bonds may be accepted where the sureties deposit as collateral with the said Secretary of the Interior any public-debt obligations of the United States guaranteed as to principal and interest by the United States equal to the full amount of such bonds, or other collateral satisfactory to the Secretary of the Interior, or show ownership to unencumbered real estate of a value equal to twice the amount of the bonds.

(May 11, 1938, ch. 198, § 3, 52 Stat. 348.)

§ 396d. Rules and regulations governing operations; limitations on oil or gas leases

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

(May 11, 1938, ch. 198, § 4, 52 Stat. 348.)

§ 396e. Officials authorized to approve leases

The Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

(May 11, 1938, ch. 198, § 5, 52 Stat. 348.)

§ 396f. Lands excepted from leasing provisions

Sections 396a, 396b, 396c, and 396d of this title shall not apply to the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma.

(May 11, 1938, ch. 198, § 6, 52 Stat. 348; May 27, 1955, ch. 106, § 2, 69 Stat. 68.)

4. Ordinances, etc.

Article XI, Section 1, ¶¶ (a) (3) and (e) of the Revised Constitution of the Jicarilla Apache Tribe:

ARTICLE XI—
POWERS OF THE TRIBAL COUNCIL

Section 1. The inherent powers of the Jicarilla Apache Tribe, including those conferred by Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of the Department of the Interior, and the restrictions established by this revised constitution.

(a) Management of tribal lands and natural resources:

* * * *

3. Resource Development. Tribal lands and natural resources may be developed for industrial or other purposes providing that such development is based upon sustained yield principles wherever applicable and provided that such development is designed for the general welfare of the tribe as a whole. The tribal

council may enact ordinances to govern the development of tribal lands and other resources.

* * * *

(e) Taxes and fees. The tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation.

JICARILLA APACHE TRIBE

ORDINANCE OF THE TRIBAL COUNCIL

OIL AND GAS SEVERANCE TAX

Ordinance No. 77-0-02
as amended by Ordinance No. 77-0-195

WHEREAS, under the Constitution of the Jicarilla Apache Tribe, the Tribal Council may impose taxes and fees upon persons and corporations doing business on the Reservation, including non-members of the Tribe; and

WHEREAS, under the Constitution of the Tribe, the Tribal Council has the authority and the obligation to govern the development of Tribal lands and other resources, and to develop such resources on sustained yield principles for the general welfare of the Tribe as a whole; and

WHEREAS, the Tribe has substantial reserves of oil and natural gas, which have been extracted from Tribal lands and exported from the Reservation, as a result of which the Tribe's resources are being rapidly depleted; and

WHEREAS, the only means by which the Tribe can establish adequate reserve funds to provide for the general welfare of the Tribe after depletion of its oil and gas is to impose a severance tax on oil and gas production.

NOW, THEREFORE, BE IT RESOLVED: That effective on the date set forth hereinafter, a severance tax is imposed on any oil and natural gas severed, saved and removed from Tribal lands, as follows:

1. *Due Date of Tax*

Such taxes shall become due at the time of severance and payable monthly as herein provided.

2. *Rate of Tax—Gas*

The severance tax set forth herein shall be at the rate of $0.5 per million BTU of gas produced on the Jicarilla Apache Reservation and sold or transported off the Reservation.

3. *Rate of Tax—Oil*

The severance tax set forth herein shall be at the rate of $0.29 per barrel of crude oil or condensate as measured under the terms of this Ordinance, which is produced on the Jicarilla Apache Reservation and sold or transported off the Reservation.

4. *Exemption*

Royalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe shall be exempt from taxation.

5. *Payment of Tax by Whom*

The operator of each well shall be liable for payment of the taxes assessed by this Ordinance and shall make payments pursuant to the terms hereof.

6. *Production Reports and Payments*

Within 45 days following the end of each calendar month, each operator of a well shall, in the statutory form and manner provided herein, make a return to the Tribe showing its total volume of oil, gas and condensate and BTU of gas produced from each well on Tribal lands for said calendar month and the amount of tax due. All taxes due or to be remitted by the operator shall accompany the return. Any additional report or information the Treasurer of the Tribe may deem necessary for the proper administration of the severance tax may also be required.

7. *Measurement of Gas*

The determination of volume, specific gravity and heating value of gas (BTU content) on which tax shall be paid shall be as set forth in the contract in force between the lessee or operator of the wells on which the tax is payable, and the purchaser of such gas, as reported by the operator or producer to the U.S. Geological Survey. Measurements of volume and heating value shall be in accordance with standard industry practices.

8. *Measurement of Crude Oil*

Crude oil subject to tax shall be measured in accordance with current contracts of sale by the operator or producer and the purchaser of such oil and in accordance with standard industry practices.

9. *Severance Tax Fund Created*

There is created an Oil and Gas Severance Tax Fund, Jicarilla Apache Tribe. All monies received shall be held in suspense by the Treasurer of the Tribe in such fund until disbursed as hereinafter provided. The Treasurer of the Tribe may execute vouchers against this fund

to make refund adjustments, payments of interest or payments for any purpose which this Ordinance may require.

10. *Reports by Treasurer, Transfer of Funds, Administration*

The Treasurer of the Tribe shall prepare a report to the Tribal Council of the Tribe semi-annually, as of June 30th and December 31st of each year, showing the amount of money collected and deposited in the Oil and Gas Severance Tax Fund, and such other information as is deemed necessary to determine the amount of money in the fund which is unencumbered. The Treasurer shall deduct from the unencumbered amount 5% of such amount for administration of this Ordinance.

Said reports shall be submitted to the Tribal Council within 90 days of the end of each reporting period. Within 30 days of the approval by the Tribal Council of said reports, the Treasurer of the Tribe shall transfer from the Oil and Gas Severance Tax Fund to the Oil and Gas Permanent Fund created by Tribal Ordinance No. 77-0-01, the amount of money which is reported to be unencumbered less 5% as above provided for administration of this Ordinance.

A Tax Administration Division is hereby established in the Treasurer's office, responsible to the Treasurer of the Tribe and the Tribal Council, with such personnel as shall be recommended by the Treasurer and approved by the Council. Expenses of said division shall be paid out of the 5% administration fund above established, as budgeted by the Tribal Council. Funds not expended or committed at the end of each fiscal year shall revert to the general fund of the Tribe.

11. *Tax Refunds*

Any person paying any tax erroneously may apply for a refund within 30 days from the date of payment of tax to the Treasurer of the Tribe, and the Treasurer shall have the authority and duty with the concurrence of the Natural Resources Committee of the Tribal Council to refund such tax if found to be erroneously paid. Any refund may, in the discretion of the Natural Resources Committee of the Tribe, be in the form of credit against future tax payments.

12. *Taxes May be Paid Under Protest*

A person paying such tax may pay such tax under protest by filing a notice of protest with the Treasurer of the Tribe at the time of payment. The protest shall be referred to the Natural Resources Committee of the Tribe by the Treasurer, as to whether the protested tax shall be refunded and a report shall be made to the Tribal Council within 45 days after the payment of the protested tax recommending disposition of said protest. The Tribal Council shall make a final decision as to the refund of said tax. If any tax shall be found to be erroneously or illegally collected, interest at the rate of 4% per annum shall be allowed on the amount erroneously or illegally collected. In the event the Tribal Council of the Tribe decides adversely to the protestant, the protestant may take whatever legal action is appropriate under the laws of the United States. Any amount of tax not paid when due shall bear 1% interest per month or a fraction thereof until paid.

13. *Consent to Suit*

For purposes of enforcement under §§ 11 or 12 hereof, the Jicarilla Apache Tribe consents to be sued either in the United States District Court for the District of New Mexico or in the Jicarilla Apache Tribal Court. The

Tribe does not consent to be sued in the state courts of New Mexico.

14. *Severability*

If any part or application of this Ordinance is held invalid, the remainder of the Ordinance or its application to other situations or persons shall not be affected.

15. *Effective Date*

The effective date of this Ordinance shall be the first of the fourth month following the approval of this Ordinance by the Tribal Council of the Tribe and the Secretary of the Interior or his authorized representative.

Adopted by the Tribal Council July 9, 1976

Approved by the Secretary of the Interior December 23, 1976

April 23, 1977

THE JICARILLA APACHE TRIBE

[SEAL]

TO: ALL OIL AND GAS LESSEES, OPERATORS AND PURCHASING COMPANIES DOING BUSINESS ON THE JICARILLA APACHE RESERVATION

Enclosed is a copy of the Oil and Gas Severance Tax Ordinance No. 77-0-02 enacted by the Tribal Council of the Jicarilla Apache Tribe on July 9, 1976 and approved on behalf of the Secretary of the Interior December 22, 1976.

The Oil and Gas Severance Tax Ordinance levies a severance tax of 5¢ per million BTU of gas produced on the Jicarilla Apache Reservation and sold or transported off the reservation, and a severance tax of 29¢ per barrel of crude oil or condensate, as measured under the terms of the ordinance, which is produced on the Jicarilla Apache Reservation and sold or transported off the reservation.

The effective date of the severance tax is the first day of the fourth month following the approval of the ordinance by the Tribal Council and the Secretary of the Interior or his authorized representative. The effective date of the tax is April 1, 1977, and initial Operator's Report Remittance forms are due in the Accounting Office of the Tribe for the month of April, 1977, within 45 days after April 30, 1977. Initial tax remittances are also due at that time.

Enclosed for your reference is the Operator's Remittance Report form to be used in reporting taxes remitted. Instructions for completion of the report are printed on the back of the report.

Thank you for your cooperation.

JICARILLA APACHE TRIBE

5. Executive Orders

Executive Orders Pertaining to the Jicarilla Apache Reservation:

Jicarilla Apache Reserve.

[Pueblo Agency; area, 447½ square miles.]

EXECUTIVE MANSION, *March 25, 1874.*

It is hereby ordered that the following-described tract of country in the Territory of New Mexico, set apart as a reservation for the Jicarilla Apache Indians by the first article of an agreement concluded with the said Indians December 10, 1873, subject to the action of Congress, be, and the same is hereby, withdrawn from sale and settlement, viz: Commencing at a point where the headwaters of the San Juan River crosses the southern boundary of the Territory of Colorado, following the course of said river until it intersects the eastern boundary of the Navajo Reservation; thence due north along said eastern boundary of the Navajo Reservation to where it intersects the southern boundary line of the Territory of Colorado; thence due east along the said southern boundary of the Territory of Colorado to the place of beginning.

U. S. GRANT.

EXECUTIVE MANSION, *July 18, 1876.*

It is hereby ordered that the order of March 25, 1874, setting apart the following-described lands in the Territory of New Mexico as a reservation for the Jicarilla Apache Indians, viz: "Commencing at a point where the headwaters of San Juan River crosses the southern boundary of the Territory of

Colorado, following the course of said river until it intersects the eastern boundary of the Navajo Reservation; thence due north along said eastern boundary of the Navajo Reservation to where it intersects the southern boundary line of the Territory of Colorado; thence due east along the said southern boundary of the Territory of Colorado, to the place of beginning," be, and the same is hereby, canceled, and said lands are restored to the public domain.

U. S. GRANT.

EXECUTIVE MANSION, *September 21, 1880.*

It is hereby ordered that the tract of country in the Territory of New Mexico, lying within the following-described boundaries, viz: Beginning at the southwest corner of the Mexican grant known as the "Tierra Amarilla grant," as surveyed by Sawyer and McBroom in July, 1876; and extending thence north with the western boundary of said survey of the Tierra Amarilla grant to the boundary line between New Mexico and Colorado; thence west along said boundary line 16 miles; thence south to a point due west from the aforesaid southwest corner of the Tierra Amarilla grant; and thence east to the place of beginning, be, and the same is hereby, withheld from entry and settlement as public lands, and that the same be set apart as a reservation for the Jicarilla Apache Indians.

R. B. HAYES.

EXECUTIVE MANSION, *May 15, 1884.*

It is hereby ordered that the tract of country in the Territory of New Mexico set apart as a reser-

vation for the Jicarilla Apache Indians by Executive order dated September 21, 1880, be, and the same hereby is, restored to the public domain.

CHESTER A. ARTHUR.

EXECUTIVE MANSION, *February 11, 1887.*

It is hereby ordered that all that portion of the public domain in the Territory of New Mexico which, when surveyed, will be embraced in the following townships, viz:

27, 28, 29, and 30 north, ranges 1 east, and 1, 2, and 3 west; 31 and 32 north, ranges 2 west and 3 west, and the south half of township 31 north, range 1 west, be, and the same is hereby, set apart as a reservation for the use and occupation of the Jicarilla Apache Indians: *Provided,* That this order shall not be so construed as to deprive any bona fide settler of any valid rights he may have acquired under the law of the United States providing for the disposition of the public domain.

GROVER CLEVELAND.

It is hereby ordered that the following-described lands in New Mexico, viz: Beginning at the northeast corner of T. 26 N., R. 4 W.; thence east along the township line between Tps. 26 and 27 N. to the northwest corner of T. 26 N., R. 5 W.; thence due south to the southwest corner of T. 22 N., R. 5 W.; thence east on the township line between Tps. 21 and 22 N. to the southeast corner of T. 22 N., R. 1 W.; thence north to the northeast corner of T. 23 N., R. 2 W.; thence west to the southeast corner of T. 24 N., R. 4 W.; thence north to the southeast corner of

T. 26 N., R. 4 W.; thence east to the southeast corner of T. 26 N., R. 3 W.; thence north to the southeast corner of T. 27 N., R. 3 W.; thence east along the southern boundary of the present Jicarilla Indian Reservation to the range line between Rs. 1 and 2 W., in T. 27 N., be,

and the same are hereby, withdrawn from sale and settlement, and set apart for Indian purposes, for the use of the Indians of the Jicarilla Indian Reservation: *Provided*, That this withdrawal shall not affect any existing valid rights of any party.

THEODORE ROOSEVELT.

THE WHITE HOUSE, *November 11, 1907.*
(711.)

Whereas it is found that Executive order of November 11, 1907, setting apart certain lands for the use of the Indians of the Jicarilla Indian Reservation, N. Mex., conflicts in part with Executive order of November 9, 1907, setting apart certain lands as an addition to the Navajo Indian Reservation, N. Mex., said Executive order is hereby so amended that the description of the tract of land thereby set apart for the purpose named therein shall read as follows:

Beginning at a point on the south boundary of the Jicarilla Indian Reservation on the range line between Tps. 26 and 27 N., Rs. 2 and 3 W., New Mexico principal meridian; thence west on said boundary to the southwest corner of the reservation; thence continuing west on the township line between Tps. 26 and 27 N. to the northwest corner of T. 26 N., R. 5 W.; thence east along the township line between Tps. 21 and 22 N. to the northeast corner of T. 21 N., R. 4 W.; thence

continuing east over unsurveyed lands along what would be, if established, the township line between Tps. 21 and 22 N. to what would be, if established, the southeast corner of T. 22 N., R. 2 W.; thence north over unsurveyed lands to what will be when established the northeast corner of T. 23 N., R. 2 W.; thence west over unsurveyed lands along what would be, if established, the township line between Tps. 23 and 24 N. to what would be, if established, the southeast corner of T. 24 N., R. 4 W.; thence north over unsurveyed lands to the southeast corner of T. 25 N., R. 4 W.; thence continuing north along the east line of T. 25 N., R. 4 W., to the southeast corner of T. 26 N., R. 4 W.; thence east over unsurveyed lands along what would be, if established, the township line between Tps. 25 and 26 N. to what would be, if established, the southeast corner of T. 26 N., R. 3 W.; thence north to the place of beginning.

THEODORE ROOSEVELT.

THE WHITE HOUSE, *January 28, 1908.*
(No. 743.)

NEW MEXICO.

CARSON NATIONAL FOREST, N. MEX.

Under authority of the act of Congress of June 4, 1897 (30 Stat., 11 at 34 and 36), and upon recommendation of the Secretary of Agriculture, it is hereby ordered that on and after March 1, 1912, the boundaries of the Carson National Forest, N. Mex., as proclaimed March 2, 1909, and modified by subsequent proclamation of August 24, 1910, be further modified by excluding therefrom all that part of the Jicarilla Apache Indian Reservation included in the said Carson National Forest by the said proclamation of March 2, 1909.

The purpose of this exclusion is to restore the Jicarilla Apache Indian Reservation in all respects to the status existing prior to the said proclamation of March 2, 1909, as though the inclusion of the lands within the Carson National Forest had not been ordered, and said Indian reservation is hereby fully recreated and restored to that status.

WM. H. TAFT.

THE WHITE HOUSE, *February 17, 1912.*
(No. 1476.)

[Source: Kappler, *Indian Affairs and Treaties*, Senate Committee on Indian Affairs, Washington 1913]

No. 80-15
(Consolidated with No. 80-11)

FILED
MAR 23 1981
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMOCO PRODUCTION COMPANY and
MARATHON OIL COMPANY,
Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, TREASURER OF THE JICARILLA APACHE TRIBE, and CECIL ANDRUS, Secretary of the Interior,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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I. THERE HAS BEEN NO "SHARED PRESUMPTION" THAT INDIAN TRIBES MAY TAX PRODUCTION BY MINERAL LESSEES UNDER EXISTING LEASES. THE LIMITED NATURE OF THE TRIBE'S SOVEREIGNTY PRECLUDES SUCH A POWER.[1]

Respondents contend that this Court in *Colville*, 447 U.S. 134 (1980), foreclosed any objection to tribal taxation, and that Indian tribes possess a general inherent power to tax nonmembers on the reservation.[2] But contrary to Respondents' claim of a "shared presumption" of the existence of such power, tribes have not heretofore asserted, nor has this Court or the Executive countenanced, Indian taxes on nonmembers other than "permit taxes" imposed as a condition of entry. Those differ fundamentally from a severance tax imposed upon nonmembers already on the reservation pursuant to Tribal leases, approved by the Secretary, which fix the compensation payable to the Tribe.[3] The expanded notion of sovereignty advanced by the Tribe is a novel effort to circumvent its contractual obligations, and must be rejected.

A. Contrary to Respondents' contentions (Sec. Br. 8-9; Jic. Br. 12-13), the Court's decision in *Colville* is not dispositive.[4] As pointed out in our opening brief (at 8-10), the tribal power to tax recognized in *Colville* was grounded solely upon the traditional power of tribes to exclude nonmembers from the reservation, or to attach conditions to their entry. Nothing cited by the Secretary or the Tribe alters this conclusion. Indeed, the 1879

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[1] Because of its length, the listing required by Rule 28.1 is contained in the Appendix to this brief.

[2] *See* Brief for the Secretary of the Interior ("Sec. Br.") at 8-18; Brief for Respondent Jicarilla Apache Tribe ("Jic. Br.") at 10-21.

[3] *See* our opening brief, at 9-10.

[4] The unlimited grant of certiorari here is hardly consistent with the suggestion that this case is "foreclosed" by *Colville*.

Senate Report[5] upon which the Secretary relies (Sec. Br. 10-11) directly supports Petitioners' view that tribes were empowered to set the terms and conditions of entry upon the reservation by prospective intruders only through a process of "contract[ing]," rather than by the imposition of a general tax.[6] The observations of this Court[7] and of the Senate Report that license or permit fees imposed by the tribes also serve to increase tribal revenues hardly constitute approval of a tax not imposed as a condition of entry, and cannot be construed to mean that the effect on tribal revenues determines the validity of the tax.

The principal authority cited by Respondents for the proposition that tribal taxation of nonmembers may exist apart from the power to exclude is *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). (Sec. Br. 11, 15-16; Jic. Br. 14-16). But the Creek tax upheld in *Buster* was an annual "permit or license" fee imposed for the privilege of transacting business within the reservation; unlike the Jicarilla, the Creek were not asserting a general taxing power. Instead, the source of the Creek taxing power challenged in *Buster* was rooted in the power to exclude. When Congress in 1902 prohibited the *removal* of nonmember landowners from the reservation, it neither undercut nor enlarged the tribe's powers,[8] inasmuch as the Attorney General had previously ruled (23 Op. Att'y Gen. 214, 219

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[5] S. Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879).

[6] The Report considered a Chickasaw law which prohibited nonmembers from renting land or procuring employment within the reservation unless they contracted with a Chickasaw and obtained an annual permit. The "tax" was a $25.00 annual fee for the permit. The sole remedy available against nonmembers who failed to comply with prescribed conditions of entry was to order the offender to leave the reservation.

[7] *Morris* v. *Hitchcock*, 194 U.S. 384, 389 (1904).

[8] The Secretary's contention that a tribe's power to tax nonmembers exists regardless of its power to "remove" them is inappropriate (Sec. Br. 16). It has never been established or even

(1900)) that federal authorities could close the businesses of nonmembers who failed to pay the tax. Just as the tribe's permit laws formerly had been enforced by excluding offenders from the reservation, the power remained to close the businesses of merchants who refused to pay the permit fee. In the context of an occupation tax, this power to exclude from the reservation's business community is the functional equivalent of the power to exclude the physical presence of nonmembers from the reservation. There was no suggestion in *Buster* that the Tribe could compel payment of the tax from recalcitrant merchants or wield any of the other enforcement powers that normally inhere in a sovereign taxing authority. Thus, *Buster* does not support an expansive reading of tribal taxing authority.

Nor can the Indian Reorganization Act be invoked as recognition of the inherent authority of tribes to exercise powers of general taxation. (*See* Sec. Br. 11; Jic. Br. 22-24). Without mentioning taxation, the IRA simply confirmed powers granted by "existing law." In the case of nonmembers, as *Colville* indicates, "existing law" permitted taxes which could be attached as conditions for "entering the reservation to engage in economic activity." [9] Nothing advanced by Respondents supports any broader reading of "existing law." [10]

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suggested that a tribe's power to *exclude* nonmembers, or attach conditions to their entry, is coterminous with a putative power to remove. Indeed, as *Buster* makes clear, the power to remove an intruder already on the reservation has almost always been exercised by the federal government acting through its Indian agents, not by the tribes.

[9] *See* 447 U.S. at 153. In support, the Court quoted the Solicitor's opinion that taxing power may be exercised over nonmembers "so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." 55 I.D. 14, 46 (1934). The Solicitor was careful to note that such conditions could not "infringe any vested rights of persons now occupying reservation lands under lawful authority." *Id.* at 50. *See also* 1 Sol. Int. Op. 873, 876 (1939).

[10] As the Secretary correctly admits (Sec. Br. 34-35), the Natural Gas Policy Act of 1978 neither grants nor confirms Indian

B. Apart from their reliance on the "permit tax" cases, Respondents also contend that Indian tribes possess all sovereign powers not specifically denied them by Congress or this Court. But this Court has consistently held that Indian tribes do not possess the full attributes of sovereignty enjoyed by the states.[11] The "attributes" of Tribal sovereignty relevant here—the power of self-government, which by definition precludes governing nonmembers, *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 147 (1810), and the territorial power of exclusion[12]—cannot support the Tribe's severance tax. None of the "platonic notions of Indian sovereignty" invoked by Respondents, *see McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 172 (1973), can alter the fact that the power to tax non-Indians is rooted solely in the power to exclude. Tribal "sovereignty" in the territorial sense can mean no more than the power to impose conditions of entry, as the Tribe has done here in its leases. By signing the leases, the Tribe explicitly surrendered the one relevant sovereign power it possessed—the power to exclude Petitioners from entering the Reservation, and to

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power "to impose severance taxes on petitioners." The Conference Report makes clear that Congress did not endorse tribal severance taxes; it merely recognized the existence of such taxes and left the question of their legality to this Court. *See* H.R. Rep. No. 1752, 95th Cong., 2d Sess. 91 (1978).

[11] *United States* v. *Kagama*, 118 U.S. 375, 381-82 (1886), quoted in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973). *See also* our opening brief at 10-13.

[12] Treaties generally recognized the right to exclude nonmembers. *See, e.g.*, II Kappler, *Indian Affairs, Laws and Treaties* (1904) (hereinafter "Kappler") 7, 9, 12, 15, 17, 20, 21, 27, 30, 42, 75, 225, 228, 230, 233, 235, 237, 240, 242-43, 245, 256, 258, 261, 312, 418, 682, 699, 703, 719, 761, 774, 779, 790, 794, 797, 800, 808, 866, 886, 888, 893, 929, 985, 990, 998, 1008, 1016, 1021. Those exclusionary provisions have not been regarded as vesting Indians with jurisdiction over nonmembers. *See Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 198 n. 8 (1978). No distinction has been made, insofar as the right to exclude is concerned, between tribes occupying treaty reservations and those whose reservations were established by Executive Order.

impose conditions on that entry other than the conditions imposed by the leases.[13]

The Tribe's powers are not enlarged by the asserted need for revenues. If tribal revenues from oil and gas leases are insufficient to recover the costs of tribal services, the United States as trustee can act to remedy the situation. Its failure to do so may stem from the fact that the rental and royalty income received by the Jicarilla Tribe is more than sufficient to support the entire operation of the tribal government.[14]

Finally, the severance tax cannot be justified by any claim that the Tribe "owns" the minerals underlying the Reservation,[15] and it should not be used as a device to

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[13] This critical difference between the limited sovereignty possessed by tribes, and the sovereign power of states to tax all persons and property within their jurisdiction, rebuts Respondents' contentions (Sec. Br. 13-14; Jic. Br. 21-22) that the Tribe should be permitted to levy a tax on mineral production because states arguably may increase severance taxes on production from state leases. As previously noted, tribes may "not infringe any vested rights of persons now occupying reservation lands under lawful authority." 55 I.D. at 50.

[14] Although Respondents argue (Jic. Br. 48-50; Sec. Br. 14) that the tax is justified by the Tribe's need for additional revenues, in part to offset expenditures allegedly incurred on behalf of Petitioners, no factual predicate for such an assertion appears in the record. The Tribe's answers to interrogatories admitted in evidence below (Pl. Exh. E, p. 7, Tr. Vol. VI, p. 269) reveal that the Tribe received $3,995,469.69 in oil and gas royalties in 1976. This figure is greater than the $3,958,201 tribal budget for fiscal 1976 (Jic. Br. 7) which included expenditures of $2,191,434 for "economic development," "per capita distribution," and "advances to tribal enterprises." While this may compare calendar year royalty revenues with fiscal year expenditures, it is apparent that the oil and gas royalty income is more than enough to support the entire tribal government.

The fact that the Jicarilla receive such substantial revenues from Petitioners should allay any fear (*see* Sec. Br. 14) that the Tribe will be reduced to collecting revenues only from "transient cigarette purchasers" fortuitously found on the Reservation.

[15] The United States retains title to the Jicarilla Reservation, which was created by executive orders. Although we agree with

renegotiate the leases.[16]

It is not surprising that the energy crisis has spawned attempts by tribes to tax and regulate [17] scarce resources underlying their reservations. But Respondents have wholly failed to demonstrate that such powers have been exercised or sanctioned in the past; and more importantly, they set forth no reason why such unprecedented tribal authority over nonmembers should be allowed today. The plain fact is that the limited sovereignty enjoyed by the Jicarilla Tribe does not admit of the broad powers it seeks here to exercise.

II. THE TRIBE HAS BEEN DIVESTED OF ANY RESIDUAL POWERS OF TAXATION.

Respondents' argument that the Tribe's taxing power has not been divested rests primarily on their claim of a

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the Secretary's contention (Sec. Br. 17-18) that the Reservation's executive order status does not diminish the Tribe's powers of self-government, or power to exclude nonmembers, it does foreclose any argument that the right to tax arises because "their" resources are being depleted. Their right of occupancy can be terminated without compensation. *See* our opening brief at 14, 18. The Jicarilla's entitlement to rentals and royalties from leasing the resources underlying the Reservation springs, not from any concept of aboriginal ownership, but solely from congressional grant expressed in the Act of March 3, 1927 (25 U.S.C. § 398b (1976)). The aboriginal lands of the Jicarilla are not included in the Reservation; the Tribe has already been compensated for such lands through the Indian Claims Commission. *See* 12 Ind. Cl. Comm. 439, 470 (1963), 17 Ind. Cl. Comm. 338 (1966); 25 Ind. Cl. Comm. 227 (1971).

[16] This severance tax is an effort to circumvent the provisions of existing leases prohibiting increases in royalties. *See* J.A. 27 and our opening brief at 3. Respondents apparently deem the present royalty provisions inadequate (Sec. Br. 12, 14-15; Jic. Br. 50), although the royalty is based on a percentage (12½%) of the value of production, *see* J.A. 24, and Tribal royalty income can only be expected to increase with deregulation.

[17] Contrary to the assertions in their oppositions to the petitions and in their briefs below to the effect that the severance tax is a necessary "sovereign tool" to restrict depletion of resources (*see* our opening brief at 26-27 n. 34), the Tribe now claims that "the power to regulate is not at issue in this case", Jic. Br. 47, and the Secretary omits any mention of the regulatory effect of the tax.

"shared presumption" that Indian tribes have a general power to tax their mineral lessees that is not dependent upon the power to exclude. That claim is wrong (*see* Part I), and so is the resulting argument.

A. Respondents mistakenly rely (Sec. Br. 18, Jic. Br. 35) on the lack of any specific reference to Indian severance taxes in the Act of March 3, 1927, and the other statutes authorizing state severance taxes on various kinds of Indian lands.[18] If there were such a general Indian power to levy severance taxes on non-Indian lessees, and if Congress intended to have it exist in parallel with the power expressly granted to the states, surely some mention would have been made of it.[19] Instead, the lack of any reference to Indian severance taxes refutes the notion that there is a "shared presumption" of any such Indian taxing authority that survived the consistent

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[18] The statutes are listed at p. 21 (Sec. Br.) and discussed at pp. 16-23 of our opening brief.

[19] The lack of mention of Indian severance taxes cannot be explained by the Secretary's suggestion that the "most natural explanation" for giving taxing authority to the states was to avoid the effect of the federal instrumentality doctrine (Sec. Br. 22). If that were so, it is puzzling that no reference was made either to Indian severance taxes or to the impact of the instrumentality doctrine on the rights of Indians, particularly since the doctrine rested on the concept that a "tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them." *Indian Oil Co.* v. *Oklahoma*, 240 U.S. 522, 530 (1916). It is also strange that the demise of the federal instrumentality doctrine 30 years ago (Sec. Br. 22 n.16), which rendered lessees of Indian lands subject to full state taxation, prompted neither attempts by the tribes to assert their supposed severance taxing powers nor even any discussion of such a possibility until now.

If Congress had intended to allow Indian taxes on mineral lessees, it could have provided for taxes for the benefit of the Indians as it did in 1901 for rights of way—*see* 25 U.S.C. §§ 319, 321 (1976). Significantly, these statutes allow taxes for "the Indians" *only* where the states do not tax, suggesting an intent to avoid conflicts which must arise where tribes and states seek to tax the same federally licensed activity.

course of congressional action.[20] This conclusion is particularly true of the 1927 Act which settled the controversy over the status of Executive Order reservations by giving the royalty interest to the Indians, and the severance taxing power (including power to tax the Indians' share) to the states.[21]

Respondents cannot avoid this conclusion by attempting to minimize the controversy attending passage of the 1927 Act and the balance it struck in settlement. The Act's sponsors correctly described the bill as "an attempt to compromise conflicting opinions as to how to develop the oil and gas resources" underlying the vast surfaces of Executive Order reservations, instead of leaving the conflict to be resolved by the *Harrison* litigation, then pending in this Court, which might leave the Indians with nothing.[22] Moreover, contrary to Respondents' con-

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[20] The lack of reference to Indian severance taxes also calls for application of the normal rule of statutory construction that double taxation cannot be inferred "in the absence of clear and unambiguous expression." Sutherland, *Statutory Construction* § 66.01 at 180 (4th ed. 1974). *See also id.* at §§ 47.23, 47.25.

[21] This conclusion is not affected by the fact that the tax provisions of the 1927 Act were drawn from the 1924 Act granting to the states the power to tax leases on treaty reservations (Sec. Br. 20-21). Although the question is not presented in this case, we do not concede that Indian tribes have a power which survived the 1924 Act to impose severance taxes on treaty reservations. Instead, we submit that, regardless of what kind of Indian reservation is involved, the power to tax non-Indians rests on the power to exclude and cannot be asserted against persons like Petitioners who have been admitted pursuant to valid leases.

[22] H.R. Rep. No. 763, 69th Cong., 1st Sess. 3, 6-9 (1926); *see also* S. Rep. No. 768, 69th Cong., 1st Sess. 6 (1926); S. Rep. No. 1240, 69th Cong., 2d Sess. (1927); H.R. Rep. No. 1791, 69th Cong., 2d Sess. (1927).

The impetus for the Act was not "an apparent lacuna in the law," as the Secretary suggests (Sec. Br. 24). Rather, as the cited reports show, the Act was prompted by the district court decision in the *Harrison* case which rejected Attorney General Stone's opinion and sustained Secretary Fall's view that the United States owned full title to Executive Order Indian reservations and could lease them without paying anything to the tribes. As the sponsors

tentions, there was substantial opposition to the 1927 Act, both from Congressmen who believed that the issue should be decided by this Court in the *Harrison* appeal and from those who argued that Executive Order reservations should be treated as public lands.[23] A fair reading of the legislative history shows that the 1927 Act was, as we contend, a carefully crafted compromise resolving a complex controversy in a way totally inconsistent with any notion that the Indians had a retained and unmentioned power to levy severance taxes in addition to exacting rents and royalties.[24]

The continuing vitality and preclusive effect of the 1927 Act were recently recognized in the Final Report of the American Indian Policy Review Commission, created by Congress "to conduct a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the Federal Government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians." Pub. L. 93-580, 88 Stat. 1910 (1975). The Commission asserted that state severance taxes inhibit tribal economic development and recom-

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anticipated, the *Harrison* litigation was dismissed upon passage of the 1927 Act, 273 U.S. 782 (1927).

The concern that the Indians might receive nothing from litigation was justified. When the question of the status of Executive Order reservations eventually reached this Court in the *Sioux* case, it was held that the Indians were not entitled to compensation for termination of an Executive Order reservation. 316 U.S. 317 (1942). *See also* our opening brief at 14-15, 18.

[23] *See, e.g.*, the minority reports in H.R. Rep. No. 763 and H.R. Rep. No. 1791, *supra*.

[24] The fact that Congress did not establish the amount of royalties or the level of state taxation does not detract from the significance of its allocation of benefits between the states and the Indian tribes, as Respondents suggest (*e.g.*, Sec. Br. 31). Because of the impact which Indian severance taxes must have upon state taxation, the balance struck by Congress would be meaningless if the tribes also possess the same right to impose severance taxes as was granted to states. *See* our opening brief at 24 and the *amici* brief of New Mexico and other states at 2-3, 11.

mended the repeal of all federal statutes authorizing their imposition (including both the 1927 Act for Executive Order reservations and the 1924 Act for treaty reservations) so that the Indians may levy severance taxes.[25] For this and the other reasons stated in our opening brief (at 22-23), there is no merit in the Tribe's claim (Jic. Br. 33) that the 1927 Act was repealed in 1938. The Secretary does not join in this claim (Sec. Br. 23 n. 16, 45), and a similar claim was recently rejected in *Blackfeet Tribe of Indians* v. *Montana*, No. CV-78-61-GF (D. Mont. Jan. 6, 1981).

The foregoing and the silence of over 40 years combine to show that the 1927 Act divested whatever Tribal severance taxing power may have existed. The congressional intent is "clear from the surrounding circumstances and legislative history" and, accordingly, there is no occasion for invoking the principle of construing ambiguities in favor of Indians. *Bryan* v. *Itasca County*, 426 U.S. 373, 393 (1976).

B. Respondents do not dispute the fact that the federal government has pervasively regulated every aspect of tribal oil and gas leasing, and that under the normal rule applicable to the sovereign states, such regulation would serve to preempt the field. Respondents argue, however, that Indian tribes should be exempted from this normal rule of construction. Yet they cannot logically maintain on the one hand that tribes retain full sovereign powers, and on the other claim exemption from those constraints that curb the lesser sovereigns within the federal system.[26]

The Tribe's tax also conflicts with federal energy policy by impeding oil production from existing wells and sig-

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[25] *See* 1 AIPRC Final Report 174, 181, 347 (1977). The significance of these recommendations is emphasized by the fact that the Commission's Vice Chairman described the Final Report as a "product of one-sided advocacy in favor of American Indian tribes" (1 AIPRC Final Report 571).

[26] The fact that the Indian Reorganization Act grants tribes organized under it the power to issue short-term leases (of less than ten years' duration) is of no consequence, since it is undisputed

nificantly increasing the price of interstate gas and oil. Notwithstanding the trial court's findings (J.A. 130), Respondents attempt to downplay these damaging effects. They claim that if state taxation of energy production does not hamper federal energy policy, then tribal taxation does not either. The short answer to this argument is that Congress, the arbiter of national energy policy, granted states the power to tax petroleum production on Indian lands to the exclusion of any comparable right in Indian tribes. That policy is undercut by Indian severance taxes which adversely impact state severance taxes and production.[27] Moreover, the cumulative burden of state and tribal severance taxes will surely make the extraction of needed resources an increasingly difficult and unpredictable process.

The comprehensive federal regulation and the national energy policy combine with the 1927 Act to divest any Indian severance taxing power that may ever have existed[28]

III. THE TRIBE IS SUBJECT TO COMMERCE CLAUSE RESTRAINTS, AND ITS TAX VIOLATES THE COMMERCE CLAUSE BY PROVIDING A DISCRIMINATORY BENEFIT TO LOCAL INDUSTRY AND IMPOSING A MULTIPLE BURDEN UPON NATIONAL COMMERCE.

Respondents' principal objection to our Commerce Clause claims rests on the contention that tribes in the

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that the Tribe did not seek to exercise that power. *See* our opening brief at 27-28 n. 35. Also, many tribes, including some of the *amici* here (*e.g.*, the Navajos), are not organized under the Indian Reorganization Act.

The preemptive effect of the federal regulatory scheme is treated in depth in the Amicus Brief of Shell Oil Co., *et al.*

[27] *See* note 24, *supra*. The inhibiting combined effect of Indian and state severance taxes is also noted in the Amicus Brief filed herein of Westmoreland Resources, Inc., an appellant in *Consolidated Edison Company* v. *Montana*, No. 80-581, which is being argued with this case.

[28] Nothing in the Natural Gas Policy Act of 1978 supports any other conclusion. *See* note 10, *supra*.

independent exercise of their sovereignty have powers greater than those possessed by the states, and are equivalent to "foreign nations" whose taxing authority is beyond judicial scrutiny. Whatever may be the merit of tribal claims to general sovereign powers over non-Indians, surely this Court should reject the notion, supported by neither precedent nor policy and rejected below,[29] that Indian tribes are unrestrained by the Commerce Clause.

A. The Negative Implications of the Commerce Clause Restrain Tribes as Well as States.

Respondents argue that Indian tribes, unlike the states, are not subject to any negative implications of the Commerce Clause, and that they are to be treated as foreign nations whose taxing statutes cannot be reviewed by this Court. (Sec. Br. 35-40; Jic. Br. 56-57). But this Court long ago squarely rejected the notion that Indian tribes are foreign nations for constitutional purposes. Rather, they are "domestic dependent nations," whose members "are considered within the jurisdictional limits of the United States, [and] subject to many of those restraints which are imposed upon our own citizens." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 11 (1831). *See also United States* v. *Kagama*, 118 U.S. 375, 382 (1886); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565-66 (1903).[30]

The Secretary finds the Tribe's supposed exemption in the language of the Commerce Clause itself. He argues that since the Clause speaks of Congress' power to regulate commerce "*with* the Indian tribes," and "*with* foreign

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[29] Respondents' extreme position was rejected by the Court of Appeals below, which held that "the Commerce Clause . . . of its own force limits the power of the tribes as well as the states." (J.A. 152).

[30] *See also* our opening brief at 32 and n. 41. In 1871, Congress, while preserving existing treaty obligations, determined that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Act of March 3, 1871, 16 Stat. 566.

nations," the Framers must have intended to accord both of these entities similar treatment, and to distinguish Congress' power over them from its power to regulate commerce "*among* the several states." This argument puts unwarranted weight on prepositional choice,[31] and it also is foreclosed both by the refusal of Congress and this Court to treat Indian tribes as foreign nations, and by the very nature of the tribes' wardship status. Since the Clause is the source of Congress' plenary power over Indian affairs, it could be argued with equal logic that its parallel language gives Congress plenary power over foreign nations. That proposition is no more absurd than the notion that Indian tribes are to be treated as "foreign nations" for purposes of the Clause.

Petitioners do not contend that Indian tribes have become indistinguishable from states. But surely for purposes of the Commerce Clause they more closely resemble states than foreign nations, and should be treated accordingly. Like states, they are subject to the superior power of the federal government; and like states, they are specifically named in the Clause and should be subject to its restraints.[32] That the Framers may have intended the

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[31] The Framers chose the phrase "with the Indian tribes" of necessity because no other language encompassed the web of commercial relations that could exist between tribes, the states, and the federal government. The simple preposition "among," which so well served to define all commerce touching the states, would have been inadequate if applied to tribes; and any attempt to delineate all possible permutations of Indian commerce would have detracted from the Clause's grand simplicity. We submit that "with the Indian tribes" was the only language available to the Framers, and that in adopting it, they intended to place within the Clause's domain more than the bilateral relations between tribes and the federal government.

[32] The doctrine that tribes are "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority" (Sec. Br. 36) has no application here. The Commerce Clause is not so framed. Also, its "negative implications" arise from the "general provisions" of the Constitution. As the case establishing the doctrine notes, tribal "powers of local self-government are . . . restrained by the general provisions of the

Commerce Clause to protect the tribes from encroachments by the states[33]—a function which it served in former times and which persists to some extent today—does not detract from its other, overriding purpose of fostering free trade throughout the nation. Nor does the Clause's protective purpose constitute a license to the tribes to impede commerce by means forbidden to the states.[34]

Constitution." *Talton* v. *Mayes*, 163 U.S. 376, 384 (1896). Moreover, we are not dealing here with internal tribal matters such as were involved in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), also cited by the Secretary. Instead, the Tribe's powers are sought to be expanded far beyond "local self-government" and to affect commerce beyond its borders. If the Tribe has the powers it seeks to exercise, they must be exercised within the restraints of the Commerce Clause.

[33] It is true that in the exercise of the territorial attribute of sovereignty, tribes have some power to exclude nonmembers from the reservation, or attach conditions to their entry (Sec. Br. 41; Jic. Br. 57), and thereby restrict commerce, but that power is not unrestrained and it is subject to the superior power of the United States. Neither that attribute nor the protective purposes of the Clause justify exempting tribes whose actions affect commerce beyond their borders from the restraints which bind the states. The same treaties which generally recognize a power to exclude (*see* n. 12, *supra*) also generally recognize that the power is subject to restraint. The treaties commonly acknowledge the authority of the United States to regulate trade with the Indians, and require the tribes to admit persons, such as licensed traders or others holding authority from the United States, to their territory. *See* II Kappler, *supra*, 10, 13, 15-16, 20, 42-43, 226, 228, 230, 233, 235, 237, 240, 242-43, 245, 256, 258-59, 261, 312, 554, 708, 761, 774, 779, 790, 794. These early expressions of national policy foreclose any suggestion that Congress or the Executive has ever recognized any power in tribes to impose burdens beyond those permitted by treaty upon those conducting commerce on the reservation pursuant to federally approved licenses, such as the Petitioners here.

[34] In *Colville* this Court noted the "limited role" the Clause may "play in preventing undue discrimination against, or burdens on, Indian commerce" and stated that it "can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes." 447 U.S. at

The scope of the Clause, and its utility, have grown with the nation. Just as activities once viewed as local are now subject to congressional power under the Clause, *see, e.g., Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970); *Wickard* v. *Filburn*, 317 U.S. 111 (1942); so too, its negative implications now restrain not only states but local governments as well. *See Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951). Indeed, the Commerce Clause would serve little purpose today if it barred only states from obstructing commerce while permitting municipalities, or other political entities, to cause the same damage.[35]

In an age in which national commerce is an organic and interdependent unit, it makes neither constitutional nor common sense to treat Indian tribes, living among us and subject to the supremacy of the national government, as though they were foreign nations on the other side of the globe and free to do what states may not.[36] If the grand purpose of the Clause is to be achieved, tribes which take actions affecting interstate commerce must

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157. Similarly, we submit, it can no longer be seriously argued that the Tribes are unrestrained by the force of the Commerce Clause.

[35] The Brief for the United States as Amicus Curiae in No. 80-581, *Commonwealth Edison Company* v. *Montana*, notes the evolving nature of the Clause and states (p. 23) that there is "no reason why, in appropriate cases, the 'negative implication' of the Commerce Clause cannot likewise reach activities formerly regarded as peculiarly 'local' in nature." We submit that this is such a case.

[36] The "political question" doctrine cannot be invoked to avoid the restraints of the Commerce Clause (*cf.* Sec. Br. 39). The Court is being asked to review a tribal ordinance, not the action of a coordinate branch of the federal government. Just as state statutes are not immunized by the political question doctrine, *see Baker* v. *Carr*, 369 U.S. 186, 210 (1962); so, too, with tribal ordinances. Moreover, the Secretary's argument rests on the erroneous premise that the political departments have "not seen fit to disagree" with the Tribe's severance tax. As shown in Part II, *supra*, and at pp. 15-23 of our opening brief, the Act of March 3, 1927 precludes Indian severance taxes.

be subject to the same negative implications which prevent the states from interfering with the free flow of commerce.[37]

B. The Jicarilla Tax Is Discriminatory.

Respondents' contention that the Jicarilla tax is not discriminatory is contradicted by the plain language of the Tribe's taxing Ordinance, and of the accompanying "instructions to lessees." (J.A. 33-37). If the Tribe had intended, as Respondents assert, to impose a nondiscriminatory tax on all production, whether retained on the Reservation or transported off prior to sale, the Ordinance should have been patterned after the New Mexico severance taxes, or any of the other state taxing statutes cited by the Tribe (Jic. Br. 52). The New Mexico statutes tax production "severed and saved" within the state and make clear that "the taxable event is the sale, transportation out of New Mexico, or consumption of the [mineral product], whichever first occurs." The Tribe chose instead to tax production which has been "severed, saved and *removed from Tribal lands*" and "sold or transported *off the Reservation.*" (J.A. 38-39) (emphasis supplied). The intent and effect of this taxing Ordinance are discriminatory.

Respondents also misread (Jic. Br. 61; Sec. Br. 42) this Court's decisions exempting the wholly proprietary activities of state governments from the restraints of the Commerce Clause. *E.g., Reeves, Inc.* v. *Stake*, 100 S.Ct. 2271 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Those cases draw a fundamental distinction between the activities of states as market regulators and states as market participants; although the former are circumscribed by the Commerce Clause, the latter are not. *See Reeves, Inc.* v. *Stake, supra* at 2277. Petitioners acknowledge that tribes, like states, are free to operate tribal enterprises on the same terms available to any other market participant—buying and selling their petroleum products from whom they please at the

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[37] The American Indian Policy Review Commission reached this same conclusion. *See* 1 AIPRC, *Final Report* 180.

price of their choice. But just as states are barred from exercising their regulatory and taxing powers in a discriminatory fashion, so too, the Jicarilla may not use any *sovereign* power to reap benefit for their own constituents at the expense of nonmembers. This is true regardless of whether the intended beneficiary of their discriminatory taxing policy is a proprietary enterprise maintained by the Tribe or a private industry operating on the Reservation.[38]

C. The Tribal Ordinance Violates the Commerce Clause Because It Taxes an Activity Which Is an Integral Part of the Flow of Commerce.

The Secretary and the Tribe have no answer to this argument. The Secretary's response (Sec. Br. 40-43) is limited to a repetition of his earlier argument (Sec. Br. 35-40) to the effect that Commerce Clause restraints are inapplicable to Indian tribes. The Tribe, on the other hand, argues (Jic. Br. 53-55) that the incidence of the tax is a "local activity" outside the reach of the Commerce Clause.[39] But the incidence of the Jicarilla severance tax is clearly not "severance," but sale or transportation of the severed products off the Reservation. The tax is levied upon the entire volume of production so sold or transported, and is not apportioned according to the length of the pipeline facilities or percentage of the lessees' business taking place on, and off, the Reservation. By the very language of the Ordinance and in practical effect, the tax must be invalidated as a direct, unapportioned levy on an integral portion of interstate commerce. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S.

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[38] The fact that no such benefitted industry yet exists is of no consequence. The Tribe has already announced plans to develop industries on the Reservation that will receive the discriminatory benefits of their tax. *See* our opening brief at 34 n.44. In any event, the tax' potential effects upon commerce must be weighed in determining its validity. *See Nippert* v. *City of Richmond*, 327 U.S. 416, 424 n. 9 (1946).

[39] The Tribe relies on the "mechanical test" of *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922), which the Solicitor General agrees can no longer immunize severance taxes from Commerce Clause scrutiny. *See* n. 35, *supra*.

157 (1954), as construed in *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734, 749 n.18 (1978).

D. The Jicarilla Tax Imposes a Multiple Burden Upon Commerce.

Respondents also err in contending that the Commerce Clause permits parallel taxing authorities in geographically overlapping areas to impose multiple burdens upon interstate commerce. Contrary to Respondents' suggestion (Jic. Br. 68; Sec. Br. 19), *Colville* does not support that position. Apart from the significant differences between the cigarette tax upheld in *Colville* and the severance tax at issue here,[40] the Court in *Colville* neither decided nor even considered whether tribal taxation violates the Commerce Clause. Indeed, the only reference in that opinion to the Commerce Clause was the Court's curt rejection of the outlandish contention that the Indian Commerce Clause of its own force prohibits *state* taxation of cigarettes. 447 U.S. at 157.

Respondents' attempts to liken the Jicarilla tax to a federal severance tax (Sec. Br. 45) are baseless. Although dual taxation by state and federal governments may be "a fact of modern life," (Jic. Br. 68), multiple taxation by states and tribes is not. Such "double taxation" by states and the federal government exists within the traditional framework of hierarchical sovereignty established in the Constitution, in which the powers of municipalities are derived from and subject to the sovereignty of the states, whose powers in turn are subject to the paramount sovereignty of the United States. If the tax of one jurisdiction interferes with the tax of another, that of the lesser sovereign must yield. *See Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 77 (1869). If the lesser sovereign's tax is allowed to continue, it does so in accordance with the wishes of its own constituents, and at the sufferance of the greater sovereign.

Dual taxation by tribes and states is an entirely different matter. The relationship between the two is not

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[40] *See* our opening brief at 8-10.

hierarchical. Both the Tribe and the state attempt to assert parallel but independent taxing authority.[41] Both are subject to the supremacy of the federal government. The Jicarilla could no more abrogate New Mexico's severance tax than could Arizona or Wyoming.

There is another crucial difference between the Jicarilla severance tax and one imposed by the United States. Non-Indians subject to the Jicarilla tax are barred under all circumstances and for all time from voting to modify or rescind the Ordinance. It is no answer to say, as Respondents do (Jic. Br. 70; *cf.* Sec. Br. 38-39), that nonmembers forced to pay both tribal and state severance taxes are free to petition the federal government for relief. If this indirect recourse were sufficient to validate an otherwise impermissible tribal ordinance, then by a parity of reasoning, states would be free to impose multiple burdens upon residents of sister states, on the theory that the victims are in any event free to petition Congress to act. Yet we know that states may not justify dual taxation on this basis.[42] Just as the failure of Congress to overrule a particular taxing scheme, whether tribal or state, cannot be construed as an endorsement of it, so too, the availability of an ultimate, congressional remedy for the taxpayer cannot justify the imposition of dual taxation by lesser sovereigns, much less by Indian tribes; this Court remains "the final arbiter of the competing demands" involved in such circumstances.[43]

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[41] By contrast, federal and state taxing authority is both vertical (i.e., hierarchically arranged) and interrelated.

[42] This Court long ago rejected the claim that the existence of Congress' affirmative power to regulate commerce among the states frees them from Commerce Clause restraints when Congress has not acted. *See, e.g., Wickard* v. *Filburn*, 317 U.S. 111, 121 (1942). *See also* Brown, "The Open Economy: Justice Frankfurter and the Position of the Judiciary," 67 Yale L.J. 219, 221-222 (1957).

[43] *See Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 454 (1979); *see also* our opening brief at 30 and Sec. Br. at 36.

It is also our position that Congress has precluded any Indian severance taxing power. *See* Part II, *supra* and our opening brief at 42 n. 52.

The Tribe's tax, when coupled with New Mexico's severance tax, constitutes an impermissible, multiple burden on the flow of commerce,[44] and for that reason is invalid [45] as discussed at pp. 39-43 of our opening brief.

CONCLUSION

For the reasons stated here and in our opening brief, the decision below should be reversed.

Respectfully submitted,

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[44] Whether that burden is borne entirely by Petitioners or is "passed on" to their customers is of no constitutional significance (*see* Jic. Br. 65). The tribal tax is prohibited because it burdens *commerce*, not because its burden is excessive or because a disproportionate share of it falls upon particular persons or industries.

[45] Even if the tax is found to be within the Tribe's power, not preempted, not discriminatory, and not a multiple burden, it may still be prohibited if not "fairly related" to services provided by the Tribe, under standards to be elucidated by this Court in *Commonwealth Edison Co.* v. *Montana*, No. 80-581. The difficulties feared by the Solicitor General in applying the "fairly related" test to a state's severance tax (Brief for United States as Amicus Curiae in *Commonwealth Edison*, p. 1) will be compounded immeasurably if this Court allows Indian tribes to levy severance taxes.

APPENDIX

LISTING PURSUANT TO RULE 28.1

Listing Pursuant to Rule 28.1

The following is the listing of parents, subsidiaries, and affiliates of petitioners pursuant to Rule 28.1.

A. *Petitioner Amoco Production Company*

Standard Oil Company (Indiana)
Amoco Canada Petroleum Company, Ltd.
Amoco Credit Corporation

Amoco International Finance Corporation
Amoco Oil Holdings S.A.
Amoco Pipeline Company

Analog Devices
Cetus Corporation
Cyprus Mines Corporation

Amoco (U.K.) Exploration Company
Cyprus Anvil Mining Corporation

Solarex Corporation

B. *Petitioner Marathon Oil Company*

Alaska Transportation Service Co.
Alsip Motel Partnership
American Minerals Company
Anspar Petroleum Corporation
Arbeitsgemeinschaft Steinkohle
Artic L&G Transportation Company
Atlantic Nickel Mines Ltd.
Automotive Fuel Corporation
Automotive Fuel Corporation of Delaware, Inc.
Badger Pipeline Company
Bluffton Community Hospital Corporation
Bonded Oil Co.
Bonded Propane
Bonded Stations, Inc.
Bonded Supply Co.
Borealis Exploration Ltd.

Bosart Company
Cairn Petroleum Ltd.
Canadian Australian Petroleum No Liability
Carriage Creek Inc.
Cavalier Petroleum Company of Cuba
Cheker Oil Company
Cheker Oil Company of Delaware, Inc.
Cheker Oil Company of Florida, Inc.
Cheker Oil Company of Indiana, Inc.
Cheker Oil Company of Michigan, Inc.
Cheker Oil Company of Ohio, Inc.
Cheker Oil Company of Wisconsin, Inc.
City Point Oil Terminal, Incorporated
CLAM Petroleum Company
Clean Seas, Inc.
Coastal Plains Oil Company
Compania Iberica Refinadora de Petroleos, S.A.
Compania Mineral Marathon, Ltd.
Consolidated Stations Incorporated
Cook Inlet Pipe Line Company
Cope Petrolera S.A.
Deutsche Marathon Explorations GmbH
Deutsche Marathon Petroleum GmbH
Deutsche Transalpine Olleitung GmbH
Domex Packaging Ltd.
Dor Rae Realty Ltd.
Dyer Industrial Park
Dynamic Petroleum Products, Inc.
East Texas Salt Water Disposal Co.
ECOL Inc.
Equadorian Offshore Corporation
Elk Water Users Association
Emro Land Company
Emro Marketing Company
Emro Propane Company
Explorer Pipeline Company
Express Oil Company

Farmers Union Central Exchange, Inc.
Federal's Inc.
Findlay Aviation Services, Inc.
Fractionation Research, Inc.
Frontier Resources, Inc.
Frontier Spar Corporation
Fuelgas Company, Inc.
Gastown, Inc. Delaware
Globe Oil Company, U.S.A.
Gravcat, Inc.
Greater Muskegon Industrial Fund, Inc.
Green Bay Terminal Corporation
(H.M. Pan Ocean-Syracuse Oil S. Africa
(proprietary) Limited)
The Harrison Township Telephone Co.
Hancock Shipping Company Limited
Hare & Company
Holden Fuel Oil Corporation
Indonesian Enterprises, Inc.
International Petrodata, Inc.
Interocean Oil Colombia, Inc.
Interocean Oil Company, Inc.
Interocean Oil Development Company (Nigeria)
Interocean Oil Exploration (Nigeria)
Kansas-Nebraska Gas Service, Inc.
Kenai Lng Corporation
Key Pipe Line Co., Ltd.
Knoll Glass Service, Inc.
Lafayette Parking, Inc.
Lee Oil Corporation
LOCAP Inc.
LOOP Inc.
Magnorth Petroleum Ltd.
Manaheim Terminal and Warehousing Service
Company
Marathon Chemical Company
Marathon Energy, Ltd.

Marathon Estanola de Petroleos, S.A.
Marathon Exploration Tunisia, Ltd.
Marathon Financial Company
Marathon Financial Corporation
Marathon Insurance Bureau
Marathon International Finance Company
Marathon International Oil Company
Marathon International Petroleum (G.B.) Limited
Marathon International S.A.
Marathon Mining Ireland, Ltd.
Marathon Oil Company (a Delaware corporation)
Marathon Oil Company (an Ohio Corporation)
Marathon Oil Foundation, Inc.
Marathon North Sea (G.B.) Limited
Marathon Oil Overseas Finance N.V.
Marathon Oil U.K., Ltd.
Marathon Petroleum Amazonas, Ltd.
Marathon Petroleum Argentina, Ltd.
Marathon Petroleum Australia, Ltd.
Marathon Petroleum Bolivia, Ltd.
Marathon Petroleum Brasul, Ltd.
Marathon Petroleum Brazil, Ltd.
Marathon Petroleum Burma, Ltd.
Marathon Petroleum Canada Ltd.
Marathon Petroleum Colombia, Ltd.
Marathon Petroleum Company
Marathon Petroleum Company (Ireland) Limited
Marathon Petroleum Ecuadoran, Ltd.
Marathon Petroleum Egypt, Ltd.
Marathon Petroleum Exploration Ltd.
Marathon Petroleum (G.B.) Limited
Marathon Petroleum Germany, Ltd.
Marathon Petroleum Guatemala, Ltd.
Marathon Petroleum Honduras, Ltd.
Marathon Petroleum Indonesia, Ltd.
Marathon Petroleum Ireland, Ltd.
Marathon Petroleum Irian Jaya, Ltd.

Marathon Petroleum Italy, Ltd.
Marathon Petroleum Kenya, Ltd.
Marathon Petroleum Libya, Ltd.
Marathon Petroleum Natuna, Ltd.
Marathon Petroleum Netherlands, Ltd.
Marathon Petroleum Netherlands Antilles, Ltd.
Marathon Petroleum Norte Brazil, Ltd.
Marathon Petroleum North Sea (G.B.) Limited
Marathon Petroleum Norway, Ltd.
Marathon Petroleum Pakistan, Ltd.
Marathon Petroleum Paraguay, Ltd.
Marathon Petroleum Peru, Ltd.
Marathon Petroleum Philippines, Ltd.
Marathon Petroleum Santo, Ltd.
Marathon Petroleum Siri, Ltd.
Marathon Petroleum Spain, Ltd.
Marathon Petroleum Sri Lanka, Ltd.
Marathon Petroleum Syria, Ltd.
Marathon Petroleum Thailand, Ltd.
Marathon Petroleum Tunisia, Ltd.
Marathon Petroleum Turkey, Ltd.
Marathon Petroleum U.K., Ltd.
Marathon Petroleum Venezuela, Ltd.
Marathon Petroleum Viet-Nam, Ltd.
Marathon Pipe Line Company
Marathon Pipe Line Company (a Nevada corporation)
Marathon Property Finance, Inc.
Marathon Refining Company
Marathon Resources, Inc.
Marathon Service Company
Marathon Services (G.B.) Limited
Marathon Trading and Shipping Company
Mebane Oil Company
Michigan Tankers, Inc.
Mid-Wood, Inc.
Mill City Petroleum

Mountain Fuel Supply Company
Muesing, Inc.
Mustang Petroleum Company
New Continental Oil Company
Oasis Oil Company of Libya, Inc.
Ocean Oil Company N.L.
Ohio Oil Company
Oil Companies Institute for Marine Pollution Compensation, Ltd.
Oil Insurance Limited
Oil Shippers Service, Inc.
Oklahoma Oil Co.
Pan Ocean de La Republica Dominicana Ltd.
Pan Ocean Energy Company
Pan Ocean Exploration, Inc.
Pan Ocean Niger, Ltd.
Pan Ocean Oil (Canada), Ltd.
Pan Ocean Oil Corporation
Pan Ocean Oil Corporation (Abu Dhabi)
Pan Ocean Oil Corporation (Equador)
Pan Ocean Oil Corporation (Indonesia)
Pan Ocean Oil Corporation (Maldive Islands)
Pan Ocean Oil Corporation (Nigeria)
Pan Ocean Oil Corporation (North Sea)
Pan Ocean Oil Corporation (Norway)
Pan Ocean Oil Corporation (Thailand)
Pan Ocean Oil Ltd.
Pan Ocean Oil Norge A/F
Pan Ocean Petroleum Netherlands, Ltd.
Pan West Pty. Limited
Parkersburg Mutual Telephone Co.
Petemco, Inc.
Petroleum Terminals, Inc.
Petroleum Terminals, Incorporated
Pilot Oil Corporation
Platos Properties, Inc.
Platte Pipe Line Company

Polar LNG Corporation
Polar LNG Shipping Corporation
POOC Caribbean Oil Finance N.V.
POOC International Oil Finance, N.V.
POOC Overseas Exploration and Development B.V.
Pooled Resources Investing in Minority Enterprises, Inc.
Port Oil Inc.
Pritchard Oil Company
Product Terminals, Inc.
P.V. Commodity Systems Ltd.
P.V. Container Systems Ltd.
Qualbank, Inc.
Redwater Water Disposal Company Limited
Russell Stewart Oil Company
Ryukyu Exploration Co., Ltd.
Sage Creek Coal Limited
San Francisco Foundation
Saratoga Minerals, Ltd.
Sidon Canal Co.
Societa Italina Per L'Oleodotto Transalpino, S.p.A.
Southern Ventures Pty.
Speedway Oil Company of Canada, Limited
Speedway Petroleum Corporation
Syracuse Oils Norge N/S
Texas-Alberta Oil Corporation
Transalpine Finance Holdings S.A.
Transalpine Olleitung Nosterreich GmbH
U-Save, Inc.
Walvis Bay Oil and Gas Ltd.
Webster Service Stations, Inc.
Westshore Pipe Line Company
Wolverine Pipe Line Company
Women's Professional Softball Club of Chicago, Inc.
Woodford Oil and Gas Ltd.
Wyoming Industrial Development Corporation

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